No. 93-1286-CSX
Status: GRANTED

Title: American Airlines, Inc., Petitioner
v.
Myron Wolens, et al.

Docketed:
February 8, 1994

Court: Supreme Court of Illinois

Counsel for petitioner: Ennis Jr.,Bruce James

Counsel for respondent: Hyman,Michael B., Gordon,Gilbert W., Greenfield,Richard D., Nelson,Brenda M., Miller,Marvin A., Romans,John N., Hitchcock,Cornish S.

Entry	Date	Note	Proceedings and Orders
1	Feb 8 1994	G	Petition for writ of certiorari filed.
3	Feb 8 1994	D	Motion of petitioner to expedite consideration of the petition for writ of certiorari filed.
2	Feb 14 1994		DISTRIBUTED. February 18, 1994 (Page 51)
4	Feb 15 1994		Opposition of Myron Wolen, et al. to motion of petitioner filed.
5	Feb 22 1994		Motion of petitioner to expedite consideration of the petition for writ of certiorari DENIED.
6	Mar 9 1994	G	Motion of Air Transport Association of America for leave to file a brief as amicus curiae filed.
7	Mar 10 1994		Brief of respondents Myron Wolens, et al. in opposition filed.
8	Mar 16 1994		REDISTRIBUTED. April 1, 1994 (Page 2)
9	Mar 16 1994	X	Reply brief of petitioner American Airlines, Inc. filed.
10	Mar 17 1994		Opposition of respondent to motion of Air Transport Association of America for leave to file a brief as amicus curiae filed.
11	Apr 4 1994		Motion of Air Transport Association of America for leave to file a brief as amicus curiae GRANTED.
12	Apr 4 1994		Petition GRANTED.
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14	May 10 1994		Order extending time to file brief of petitioner on the merits until June 2, 1994.
15	Jun 2 1994		Brief amicus curiae of Air Transport Association of America filed.
16	Jun 2 1994		Brief amicus curiae of Chamber of Commerce of the United States of America filed.
17	Jun 2 1994		Joint appendix filed.
18	Jun 2 1994		Brief of petitioner American Airlines, Inc. filed.
20	Jun 2 1994		Brief amicus curiae of United Air Lines Inc. filed.
21	Jun 2 1994		Brief amicus curiae of United States filed.
19	Jun 3 1994		LODGING BY PETITIONER, 1) American Airlines AAdvantage Program Brochure; 2) American Airlines Advantage Master Card/Visa brochure; and 3) Petition of American Association of Discount Travel Brokers, etc. (3 COPIES LODGED)
22	Jun 17 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Jun 24 1994		Order extending time to file brief of respondent on the

No. 93-1286-CSX

Entry	Date	Note	Proceedings and Orders
			merits until Ju ' 20, 1994.
23	Jun 27 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
26	Jul 20 1994		Brief of respondents Myron Wolens, et al. filed.
27	Aug 5 1994		CIRCULATED.
28	Aug 10 1994		Record filed.
		*	Partial record proceedings Supreme Court of Illinois.
29	Aug 19 1994	X	Reply brief of petitioner filed.
30	Aug 25 1994		SET FOR ARGUMENT TUESDAY, NOVEMBER 1, 1994. (1ST CASE).
31	Oct 25 1994		LODGING consisting of 10 copies of typwritten document, 4/2/94 letter from Jeffrey Shane to J.E. Murdock III, submitted by counsel for the petitioner,
32	Nov 1 1994		ARGUED.
33	Nov 29 1994		LODGING consisting of one set of 7 CAB Orders as follows: CAB Orders (2/6/79),(9/27/79),(7/28/81), (8/28/81) (8/9/84),(1/19/79),(12/11/81) submitted by counsel for the petitioner.

No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P. S. TUCKER,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the express preemption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, preempt only those state law claims that relate to "essential" airline operations?

2. Does the scope of preemption under Section 1305 depend on the form of relief requested?

RULE 29.1 STATEMENT

Petitioner is wholly owned by AMR Corp., a Delaware corporation, and owns 49% of DFW Terminal Corp., a Texas corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner American Airlines, Inc. ("American") respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court in this case entered December 16, 1993.[1]

OPINION BELOW

A prior opinion of the Illinois Supreme Court in this case is reported at 589 N.E.2d 533, and is reproduced in the Appendix to this Petition (App.) at 20a. That opinion was vacated by this Court in *American Airlines v. Wolens*, 113 S. Ct. 32 (1992), reproduced at App. 19a. The opinion and judgment of the Illinois Supreme Court on remand is presently unreported (1993 WL 518593 (Ill.)) and is reproduced at App. 1a.

[1] American is an interstate and international air carrier incorporated in Delaware with its principal place of business in Fort Worth, Texas. All parties to the proceeding before the Illinois Supreme Court are listed in the caption.

JURISDICTION

This petition has been filed within 90 days following entry of the judgment of the Illinois Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the express preemption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), which provides in relevant part as follows:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

STATEMENT OF THE CASE

On remand from this Court after *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), the Illinois Supreme Court held that Section 1305 of the Airline Deregulation Act does not preempt state law challenges to the terms and conditions of airline frequent flyer programs because such programs are not "essential elements" of airline operations, and because the relief requested, compensatory and punitive damages, would not directly "establish" the rates, "determine" the routes, or "dictate" the services offered through those programs.

Review of this decision is urgently needed. In direct conflict with *Morales* and with several federal courts of appeals, the Illinois Supreme Court has approved nationwide class actions raising state law challenges to airline rates and services that Congress plainly intended

to preempt under Section 1305, and has thereby jeopardized the objectives of the Airline Deregulation Act.

A. Background.

Congress passed the Airline Deregulation Act in 1978. As this Court recognized in *Morales*, the Act places "maximum reliance on competitive market forces" to further "efficiency, innovation and low prices" as well as the "variety [and] quality . . . of air transportation services." 112 S. Ct. at 2034. To "ensure that the States would not undo federal deregulation" by imposing burdensome and potentially conflicting state requirements, *id.*, the Act expressly preempts all state laws "relating to [the] rates, routes, or services" airlines offer. 49 U.S.C. App. § 1305.

Frequent flyer programs were an important product of deregulation. In 1981 American introduced the first such program, the "AAdvantage" program, as a service for American's customers and an innovative way of competing with other airlines. American's competitors quickly followed suit, and today every major airline has its own frequent flyer program.

AAdvantage members accrue mileage credits when they fly on American. They can then use their mileage, subject to the terms and conditions of the program, to buy tickets to fly on domestic or international routes, or to upgrade to a higher level of service.[2] AAdvantage members thus purchase airline services by redeeming accrued mileage at rates set by American for such services. Whether tickets are purchased with cash or with AAdvantage awards, the essence of the transaction is that American is setting the rates for the primary service it offers—air travel.

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[2] Mileage credits can be earned in a variety of other ways and can also be exchanged for services that do not involve air travel. Those non-flight services were not challenged in this litigation.

AAdvantage program membership has dramatically expanded since 1981 and now includes millions of participants from all 50 States and many foreign countries. As the United States Department of Transportation has found, air "carriers use their [frequent flyer] programs as a means of competing for passengers. Since the programs began, each carrier has greatly expanded the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive." [3] Over the years, American has expanded its route system to serve popular but previously unavailable destinations such as the Caribbean, Europe and the Far East. AAvantage members can use mileage credits accumulated before American's routes were expanded to purchase flights to those new destinations.[4]

Like all other airlines, American from time to time must modify the balance of benefits and restrictions in its AAdvantage program. The Department of Transportation has concluded that such changes are "legitimate methods for controlling the cost of frequent flyer plans." Indeed, as DOT has observed, without such cost controls frequent flyer programs would be too expensive for the airlines to maintain. *See* DOT Order, App. 100a.

B. The Proceedings Below.

Respondents are residents of Illinois, California and Connecticut. They filed parallel suits, later consolidated,

[3] Dep't of Transportation Order No. 92-5-60 (May 29, 1992) ("DOT Order"), App. 99a.

[4] Frequent flyer programs also directly involve foreign commerce because American and other airlines now allow mileage to be redeemed for flights to foreign destinations, and because partnerships with airlines of different countries have been negotiated to permit redemption of mileage for travel on those foreign airlines. Many foreign governments claim the right to regulate such programs for the protection of their own national airlines. Accordingly, the Department of State, in its conduct of bilateral aviation negotiations with other countries, has had to defend the ability of U.S. airlines to use frequent flyer programs as a marketing tool.

in Illinois state court, purporting to represent a nationwide class "consisting of approximately four million" AAdvantage members.[5] Respondents challenged American's May 1988 modifications to the AAdvantage program.[6] In particular, respondents challenged American's policies regarding the number of seats on particular flights set aside for AAdvantage members (capacity controls) and American's alleged restrictions on the dates certain kinds of AAdvantage awards could be used (blackout dates).[7]

Respondents conceded that American had explicitly "reserved the right to restrict, suspend, or otherwise alter aspects of the Program," [8] but alleged that this express reservation did not provide adequate notice that American retained the right to alter program terms for previously accumulated mileage.[9] Respondents thus directly challenged American's right to determine the number of AAdvantage seats available on any given flight. They claimed an Illinois state law right to use their AAdvantage mileage to purchase "any available seat" on "any available date" (*i.e.*, airline "services"), at particular AAdvantage fares (*i.e.*, "rates").[10]

Respondents alleged that American's conduct violated both the Illinois Consumer Fraud and Deceptive Business Practices Act ("the Consumer Fraud Act"), Ill. Rev. Stat. ch. 121½, sec. 261 *et seq.*, and Illinois contract law. They sought two forms of relief: (i) compensatory

[5] Tucker Complaint, Count I, ¶ 5; App. 63a.

[6] Wolens Complaint, Count I, ¶ 14; App. 52a.

[7] Respondents did not complain of the many additions to the AAdvantage program that increased the "value" of their previously accumulated mileage.

[8] Tucker Complaint, Count I, ¶ 12; App. 64a.

[9] *See* Wolens Complaint, Count III, ¶ 15; App. 56a.

[10] *See* Wolens Complaint, Count I, ¶ 13; App. 52a.

and punitive damages;[11] and (ii) an injunction requiring American to redeem mileage credits accumulated before May 1988 for the same fares and unrestricted seating respondents claim they could have obtained before that date, and preventing "retroactive application" of any future changes in the program.[12] The damages and injunctive claims were premised on identical facts and causes of action.

American moved to dismiss these claims under Section 1305 of the Airline Deregulation Act, on the ground that the claims related to American's "rates, routes, or services," and were therefore preempted. The trial court denied American's motion but certified that ruling for interlocutory appeal. App. 41a.

C. The Illinois Supreme Court's Initial Decision.

After an intervening appellate court decision (App. 31a), the Illinois Supreme Court held that Section 1305 preempted respondents' claims for injunctive relief. The court reasoned that "injunctive relief would involve the regulation of defendant's services and therefore violate section 1305." App. 23a. The court then ruled that Section 1305 did *not* preempt respondents' identical "claims for damages for breach of contract and violation of the Consumer Fraud Act." App. 23a. The court relied on what it incorrectly characterized as "the prevailing view, set forth in *West v. Northwest Airlines, Inc.*, (9th Cir. 1990), 923 F.2d 657, that 'section 1305(a)(1) pre-empts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services.'" App. 23a. The court frankly stated that it had "narrowly construed" Section 1305 "to preempt only those State laws and regulations that *specifically* relate to . . . an airline's rates, routes, or services." App. 24a (emphasis added).

[11] Wolens Complaint, Counts I-IV, ¶ B, App. 53a, 55a, 58a, 59a; Tucker Complaint, Counts I-IV, ¶ B, App. 67a, 68a, 71a, 72a.

[12] Tucker Complaint, App. 67a.

Chief Justice Miller concurred in the judgment. He disagreed with the majority's view that preemption depends on "whether the State law at issue is general or specific." App. 25a. He contended that Section 1305 did not apply for a different reason: respondents' damages claims were "not regulatory in force or effect" because they "do not establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." App. 28a.

D. This Court's Prior Decision.

After the Illinois Supreme Court's initial judgment, this Court decided *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). *Morales* held that state law "relates to" airline "rates, routes, or services," and is therefore preempted by Section 1305, if it has a "connection with or reference to" rates, routes, or services—"even if the law is not specifically designed" to regulate airlines. 112 S. Ct. at 2033, 2038. *Morales* found it "utterly irrational" that "state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general" law. *Id.* at 2035. Applying this sweeping interpretation of Section 1305, the Court held that deceptive advertising claims against airlines (based on guidelines promulgated by the National Association of Attorneys General ("NAAG")) were preempted.

American petitioned for certiorari, arguing that the Illinois Supreme Court's decision relied on precisely the distinction *Morales* rejected—between general laws and laws that "specifically" relate to airline rates, routes, or services.[13]

[13] Shortly after issuing its ruling in *Morales*, this Court vacated the Ninth Circuit's ruling in *West v. Northwest Airlines* (the

Respondents did not cross-petition for review of the Illinois Supreme Court's decision to preempt their injunctive claims. To the contrary, they conceded that this aspect of the decision was "carefully reasoned" and "fully consistent" with *Morales* because injunctive relief "would require the court to regulate the manner in which American provided its passengers transportation services."[14] Respondents nonetheless argued that *Morales* did not require reconsideration of the Illinois Supreme Court's refusal to preempt their damages claims because damages, unlike an injunction, would not have a direct regulatory effect on American's conduct.[15]

This Court granted American's petition for certiorari, vacated the Illinois Supreme Court's judgment, and remanded for reconsideration in light of *Morales*. *American Airlines, Inc. v. Wolens*, 113 S. Ct. 32 (1992); App. 19a.

E. The Illinois Supreme Court's Decision on Remand.

On December 16, 1993, the Illinois Supreme Court reaffirmed its prior holding in all respects. Writing for the majority, Justice Bilandic expressly reaffirmed the court's prior ruling preempting respondents' injunctive claims. App. 2a. The court then held that its "previous holding that plaintiffs' claim for money damages was not preempted because it bears only a tangential relation to airline rates, routes, and services, comports with the *Morales* decision." App. 6a.

The court gave two new reasons for reaffirming its refusal to preempt respondents' damage claims. *First*, the court concluded that "[a] frequent flyer program is not

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ruling on which the Illinois Supreme Court's initial opinion was based), and remanded for reconsideration in light of *Morales*. *See Northwest Airlines, Inc. v. West*, 112 S. Ct. 2932 (1992).

[14] Brief in Opposition in No. 92-249, at 9.

[15] *Id.* at 9-11.

an essential element to the operation of an airline" because "the airline industry functioned successfully for decades" without frequent flyer programs. App. 6a. Therefore, in the court's view, state law suits challenging a frequent flyer program would have only a "peripheral" or "tangential" effect on airline operations. App. 6a. *Second*, expressly adopting the test for preemption urged in Chief Justice Miller's prior concurrence, the court concluded that because respondents were seeking "*only* money damages," App. 6a (emphasis added), their claims did not " 'seek to establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.' " App. 6a (quoting prior opinion).[16]

Justice McMorrow dissented. She noted that "reduced to their simplest terms, plaintiffs' claims . . . are based upon allegations of American's deceptive advertising, promotions, and inducements relating to airline fares (i.e., payment of travel fares with mileage credits and upgrades in seating classes) and services (i.e., the quantity of seats and flights and the dates of travel to various destinations)." App. 12a. She also noted that "[p]laintiffs' allegations virtually mirror the restrictions . . . in the NAAG Guidelines on frequent flyer programs." App. 12a. Justice McMorrow stressed that *Morales* "rejected a contention essentially the same as that made by Justice Miller in his special concurrence to this court's previous opinion *and now adopted by the majority*, that plaintiffs' claims are not preempted because they do not seek to 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines

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[16] Although the Illinois Supreme Court did not explain the relation between these two grounds of decision, both were necessary to its result. If the court's application of Section 1305 depended entirely on whether the airline conduct at issue was "essential," the court would necessarily have declined to preempt the injunctive claim.

must provide.'" App. 9a (quoting majority opinion; emphasis added). In Justice McMorrow's view, Section 1305 applied equally "whether plaintiffs seek [an injunction] to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations." App. 13a.

Unlike the majority, Justice McMorrow recognized that *Morales* gave an "expansive and sweeping interpretation of the phrase 'relating to'" in Section 1305. Justice McMorrow recognized that the claims at issue in this case directly paralleled those at issue in *Morales*. As in *Morales*, respondents here invoked state law to create binding obligations and enforceable duties based on allegedly insufficient notice, and sought to require American to "continue to redeem mileage credits earned prior to May 1988 for the same free fares and unrestricted seating and flight services which the AAdvantage program provided up until that time," or pay "money damages for . . . breach of those contractual obligations." App. 13a. Contrasting the majority's interpretation of Section 1305 with the Seventh Circuit's interpretation in *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. 603 (1993), Justice McMorrow concluded that "under the rationale of *Morales* and its progeny, plaintiffs' [compensatory and punitive damages] claims have a connection with and relation to American's rates and services, and are preempted by section 1305 (a)(1) of the Deregulation Act." App. 14a, 16a.[17]

[17] The Illinois Supreme Court stayed its mandate pending disposition of the instant petition for certiorari. App. 17a.

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court's decision on remand from this Court conflicts directly with *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). The decision threatens the economic stability of the airline industry and undermines the core federal policies of the Airline Deregulation Act.

Despite *Morales*' clear directive that Section 1305 should be given an "expansive sweep," *id.* at 2037, the Illinois Supreme Court has continued to apply Section 1305 extremely narrowly. As a result, Illinois state courts are the forum of choice for nationwide class actions challenging frequent flyer programs and a host of other airline practices that Congress plainly intended to exempt from regulation by the fifty States. In addition to the present case, a nationwide class action suit challenging United Airlines' frequent flyer program was filed in Illinois state court in December 1993.[18] A similar action challenging Delta Airlines' frequent flyer program, previously dismissed without prejudice pending the Illinois Supreme Court's ruling in this case, will certainly be reinstated.[19] Three additional class actions challenging other aspects of airline rates and services are also pending in Illinois state court.[20] These class actions collectively

[18] *Silver v. United Airlines, Inc.*, No. 93 CH-11098 (Circuit Court of Cook County) (filed December 10, 1993) (Copies of the complaint have been lodged with the Clerk of this Court). Like the complaint in this case, *Silver* invokes the Illinois Consumer Fraud Act and Illinois common law of contract to assert claims on behalf of millions of members of United's Mileage Plus program.

[19] *Ryan v. Delta Airlines, Inc.*, No. 88 CH-4846 (Circuit Court of Cook County). In an order dated October 21, 1992, the court dismissed the case without prejudice, "pending the decision of the Illinois Supreme Court in Wolens v. American Airlines," and granted plaintiffs the "right to reinstate without costs after said ruling."

[20] *See Johnson v. American Airlines, Inc.*, No. 93-1156 (Appellaate Court of Illinois) (cancellation policies); *Baskin v. United Airlines,*

threaten the nation's major airlines with massive liabilities, and will force all national airlines to conform their nationwide practices to the particular strictures of Illinois law—a result antithetical to the central objective of the Airline Deregulation Act. This prospect justifies immediate review whether or not other courts would adopt the interpretation of Section 1305 that now prevails in Illinois.

Review is all the more necessary because the Illinois Supreme Court's decision is illustrative of widespread conflict and confusion in the lower courts. In particular, the Illinois Supreme Court's decision conflicts with the decisions of federal courts of appeals, including the Seventh Circuit, on two important and recurring questions that have divided the lower courts even after *Morales*: (1) whether a state claim that "relates to rates, routes, or services" within the meaning of Section 1305 is preempted only if the conduct at issue meets the additional requirement of being "essential" to an airline's operation; and (2) whether preemption under Section 1305 depends on the form of relief requested.

I. THE ILLINOIS SUPREME COURT DISREGARDED *MORALES v. TRANS WORLD AIRLINES, INC.* ON A MATTER OF CRITICAL IMPORTANCE TO THE AIRLINE INDUSTRY.

The decision of the Illinois Supreme Court conflicts directly with *Morales*, which broadly established that Section 1305 preempts all state claims "having *a connection with* or *reference to* airline 'rates, routes, or services.'" 112 S. Ct. at 2037 (emphasis added).[21]

Inc., No. 93-1214 (Appellate Court of Illinois) (cancellation policies); *Quality G&B of Illinois v. Airborne Freight Corp.*, No. 93-3895 (Appellate Court of Illinois) (air freight services).

[21] As the Court held, Section 1305, like the similarly-worded ERISA preemption provision, has "an expansive sweep" and is "conspicuous for its breadth." 112 S. Ct. at 2037 (quotations omitted). Thus, Section 1305 "ensure[s] that the States would not undo federal deregulation" through the application of their own potentially conflicting laws, and leaves protection of consumers as the responsibility of the United States Department of Transportation under uniform federal standards. *Id.* at 2034, 2040. DOT's statutory authority is codified at 49 U.S.C. § 1381.

The Illinois Supreme Court acknowledged that respondents' claims have a connection with American's rates, routes, or services, and so held when it preempted their injunctive claims. App. 2a. The court nevertheless refused to preempt respondents' compensatory and punitive damages claims, even though those claims were based on the same facts and causes of action. Seeking to justify these contradictory dispositions, the Illinois Supreme Court seized on *Morales' dictum* that some state laws (like gambling and prostitution laws) may "affect" rates, routes, or services "in too tenuous, remote or peripheral a manner" to warrant preemption. App. 6a-7a (quoting *Morales*, 112 S. Ct. at 2040). According to the Illinois Supreme Court, respondents' damages claims were "tenuous, remote or peripheral" within the meaning of *Morales* because frequent flyer programs—though related to airline rates and services—are not "essential" to airline operations, and because a damages remedy would not "establish" the rates, "determine" the routes, or "dictate" the services airlines offer.

That ruling flies in the face of *Morales*. The *Morales* test preempts respondents' damages claims because those claims bear an obvious "connection with or reference to" airline rates and services. Respondents directly seek a judicial determination that they have a right under Illinois state law to purchase the core "service" provided by American—air travel—at particular AAdvantage "rates," and that they may recover compensatory and punitive damages for an alleged violation of that "right." The connection with American's rates and services could hardly be closer. As in *Morales*, respondents claim they

were injured by allegedly inadequate notice regarding limits on the availability of rates and services, and seek to transform that "fail[ure] to include the mandated explanations and disclaimers" into an "enforceable right" to particular services at particular rates. *See Morales*, 112 S. Ct. at 2039-40 (emphasis added).

Morales refutes the two reasons offered by the Illinois Supreme Court for refusing to preempt respondents' damages claims. *First*, the Illinois Supreme Court's "essential element" test is antithetical to the expansive "connection with or reference to" test established in *Morales*. This Court repeatedly emphasized that Section 1305 is "conspicuous for its breadth," and must be given an "expansive sweep." 112 S. Ct. at 2037. Under the Illinois Supreme Court's "essential element" test, airline practices postdating deregulation—including not only frequent flyer programs but also competitive innovations such as American's Ultimate Supersaver deep discount fares—are not "essential" and therefore can be regulated. Prior to deregulation, however, the Civil Aeronautics Board strictly regulated *all* aspects of airline competition, including the prices airlines charged and the routes they served. Congress chose deregulation in 1978 because it believed that vigorous competition would produce better results for consumers. By using a historical test to determine what airline operations are "essential," the Illinois Supreme Court has contravened congressional intent, and reversed the benefits of deregulation, by permitting States to step in and regulate the very innovations deregulation was intended to encourage. Furthermore, the Illinois Supreme Court's test requires state courts to make technical, expert judgments as to whether the conduct at issue concerns a part of the airline's business that is "essential" to its operations. These are precisely the types of determinations which the Airline Deregulation Act, and Section 1305 in particular, were designed to preclude.

Second, *Morales* forecloses any distinction under Section 1305 between claims seeking damages and claims seeking injunctive relief. As Justice McMorrow stressed in dissent below, *Morales* squarely *rejected* the contention that Section 1305 "only preempts the States from actually prescribing rates, routes or services," and held that such an interpretation "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services.'" App. 16a. (quoting *Morales*, 112 S. Ct. at 2037-38 (emphasis in original)). Adopting the Court's earlier ERISA precedents, *Morales* followed *Pilot Life*, which "held that a common-law tort and contract action *seeking damages* . . . was pre-empted by ERISA." *Morales*, 112 S. Ct. at 2039 (emphasis added).[22] Thus, *Morales* clearly held that Section 1305 preempts actions seeking damages even if damages would not actually "establish" rates, "determine" routes or "dictate" services.[23]

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[22] The Court has consistently declined to distinguish between damage awards and injunctive relief under the identically-worded ERISA preemption provision. *E.g. Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138-39 (1990). In *Morales* the Court made clear those ERISA precedents are fully applicable to Section 1305. 112 S. Ct. at 2039.

[23] In this respect, the Illinois Supreme Court's decision also conflicts with *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), which confirmed that the form of relief is generally irrelevant to preemption analysis. Justice Stevens' opinion (for four Justices) specifically refused to distinguish between damages and injunctive claims, because "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." 112 S. Ct. at 2620 (quotation omitted); *accord id.* at 2632, 2634 (Scalia and Thomas, JJ., concurring). *See also San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959); *International Paper Co. v. Ouellette*, 479 U.S. 481, 498 n.19 (1987) ("We decline . . . to draw a line between the types of relief sought. . . . [U]nless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is . . . pre-empted.").

The Illinois Supreme Court's ruling is such a clear departure from *Morales* that summary reversal is appropriate. If the decision is not summarily overturned, then plenary review is urgently needed because of the decision's nationwide impact on the airline industry. Under the Illinois Supreme Court's decision, respondents can seek compensatory and punitive damages against American on behalf of millions of class members residing throughout the country. In addition, because all airlines adjust their operations—including frequent flyer programs—as competitive conditions in the volatile airline industry change, all national airlines now face a risk of similar suits in Illinois challenging their frequent flyer programs, and other aspects of their rates and services. Separate class actions have been filed in Illinois state courts challenging the frequent flyer programs of United Airlines and Delta Airlines, as have three additional class actions challenging other aspects of airline rates and services. *See* page 11 *supra*. The pace of such filings will surely quicken if certiorari is denied in this case.

As a practical matter, the Illinois Supreme Court's decision requires all major airlines to conform their nationwide conduct to Illinois' restrictive standards, irrespective of the negative effect on competition and consumer welfare. It is irrelevant that other courts might interpret Section 1305 properly, and preempt damage claims involving frequent flyer programs, because litigants will simply bring their claims in Illinois state courts.[24] The Illinois Supreme Court has thus established a *de facto* national rule barring the application of Section 1305 to damage claims involving the rates, routes, or services

[24] To the extent other States are emboldened to follow the erroneous path taken by Illinois and assert sovereignty over air[illegible]e frequent flyer programs or other aspects of airline operations, airlines will face the need to run their programs in compliance with the "lowest common denominator" established by any of the 50 States—the very result Congress sought to prevent by enacting Section 1305.

offered through frequent flyer programs, and has forced airlines to tailor their frequent flyer programs to Illinois' regulatory requirements.[25] Congress surely did not intend this result.

Furthermore, review should be granted in this case because it directly involves the 1987 NAAG Guidelines, the advertising portions of which were held to be preempted in *Morales*. As Justice McMorrow stressed in dissent, respondents' allegations "virtually mirror the restrictions regarding the advertising of frequent flyer benefits and the institution of capacity controls and other frequent flyer program modifications without advance notice . . . in the NAAG Guidelines." App. 12a.[26] Thus, the Illinois Supreme Court has effectively held that Section 1305 does not preempt the frequent flyer provisions of the Guidelines, even though *Morales* holds that Section 1305 *does* preempt the advertising provisions of those same Guidelines. The Illinois Supreme Court's ruling is

[25] This aspect of the Illinois Supreme Court's ruling also violates the Commerce Clause, both because Illinois is establishing a *de facto* national standard, *see Huron Portland Cement Co. v. Detroit, Michigan*, 362 U.S. 440, 444 (1960); *Southern Pac. Co. v. State of Arizona*, 325 U.S. 761, 767 (1945), and because Illinois is projecting its "regulatory regime into the jurisdiction of another state." *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 337 (1989). American raised these Commerce Clause arguments in the Illinois Supreme Court. The court never addressed those arguments as they apply to respondents' damage claims. The presence of these Commerce Clause issues is an additional reason for granting certiorari.

[26] Illinois is a signatory to the Guidelines. The Illinois Consumer Fraud Act will therefore be enforced with respect to frequent flyer programs in accordance with those Guidelines. *See Morales*, 112 S. Ct. at 2041 (Appendix) (noting that the Illinois Attorney General served on a NAAG task force to evaluate the effectiveness of the Guidelines). Indeed, the Attorney General of Illinois was a party to *Morales*. *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 784 n.1 (5th Cir. 1989) (identifying Illinois as an appellee).

a matter of national importance because 34 States are signatories to the Guidelines. For this reason, the question presented in this petition is at least as important as the question presented in *Morales*.[27]

II. THE DECISION OF THE ILLINOIS SUPREME COURT CONFLICTS WITH DECISIONS OF FEDERAL COURTS OF APPEALS, INCLUDING THE SEVENTH CIRCUIT.

Plenary review is also warranted because the Illinois Supreme Court's decision conflicts with decisions of federal courts of appeals, and reflects persistent and widespread confusion over the scope of Section 1305 preemption, in two distinct ways. *First*, the Illinois Supreme Court's ruling that Section 1305 preempts only state laws that affect "essential elements" of airline operations conflicts with other courts regarding what falls within the definition of "relating to rates, routes, or services" in Section 1305. *Second*, the Illinois Supreme Court's ruling conflicts with other courts regarding whether Section 1305 preemption depends on the form of *relief* requested.

Unfortunately, as the present case starkly illustrates, *Morales* has not put to rest the recurring disagreements in the lower courts about the preemptive scope of Sec-

[27] The striking similarities between the NAAG fare advertising provisions held preempted in *Morales* and the NAAG frequent flyer provisions at issue here demonstrate that this action "relates to" airline rates and services. Both provisions prescribe the specific disclosures airlines must make regarding any restrictions or reservations that might apply. Just as the fare advertising provisions require "clear and conspicuous" disclosure of restrictions such as "limited time availability . . . day-of-week restrictions . . . [and] limits on fare availability," *Morales*, 112 S. Ct. at 2038-39, the frequent flyer provisions require "clear and conspicuous" disclosure of "any reservation of any right to make future changes in the program award level," *Morales*, 112 S. Ct. at 2039, including in particular any changes involving "blackout dates" or "capacity controls." *Id.* at 2049. This lawsuit is based on the claim that American's reservation of rights was not sufficiently "clear" under Illinois law.

tion 1305. Some courts have correctly followed *Morales* and given Section 1305 the broad scope Congress intended. *E.g., Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *petition for rehearing en banc granted*, 1994 WL 6232 (Jan. 12, 1994); *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. 603 (1993); *Vail v. Pan Am Corp.*, 616 A.2d 523 (N.J. 1992). Indeed, at least one federal district court in the Ninth Circuit has held that Section 1305 preempts state consumer fraud and breach of contract claims seeking damages for alleged failure to provide adequate notice of changes in the terms of a frequent flyer program. *Shaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D. Cal. Sept. 18, 1992).[28] Other courts, including the Illinois Supreme Court, have converted *Morales*' suggestion that some state laws (such as prostitution or gambling laws) may affect rates, routes, or services in "too tenuous, remote or peripheral a manner" into a loophole allowing them to continue to construe Section 1305 narrowly. *E.g. West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993), *petition and cross petition for certiorari pending* (Nos. 93-803, 93-901).

As with the similarly worded ERISA preemption provision, Section 1305's application to "a wide variety of state statutory and decisional law" is generating a continuing need for guidance from this Court. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). The pat-

[28] Justice McMorrow's dissent noted the conflict between *Shaefer* and the majority opinion. *See* App. 14a. The decision below also conflicts with several other federal district court decisions involving other airlines services. *E.g., Continental Airlines, Inc. v. American Airlines, Inc.*, 824 F. Supp. 689 (S.D. Tex. 1993) (Section 1305 preempts common law damage claims for tortious interference and unfair competition based on airline prices); *Lawal v. British Airways, PLC*, 812 F. Supp. 713 (S.D. Tex. 1992) (Section 1305 preempts damage claim for failure to honor discount ticket); *Cannava v. U.S. Air*, 1993 U.S. Dist. LEXIS 16726 (D. Mass. Jan. 7, 1993) (Section 1305 preempts damage claim for mistreatment during boarding).

tern of confused and conflicting decisions after *Morales* replicates the pattern under ERISA.[29] Thus, as in the ERISA context, "it is hardly surprising" that *Morales* did not settle all questions regarding the application of Section 1305, and that additional guidance is needed from this Court. *See Pilot Life*, 481 U.S. at 47. Indeed, this Court's opinion in *Morales* expressly recognized that further development of the law would be necessary to determine the outer boundaries of Section 1305. *See Morales*, 112 S. Ct. at 2037-39.

A. Scope of "relating to rates, routes, or services."

The Illinois Supreme Court concluded that claims which plainly relate to an airline's rates and services are *not* preempted because a "frequent flyer program is not an essential element to the operation of an airline," and because "frequent flyer programs are peripheral."[30] This ruling conflicts with other circuits in an outcome determinative way, and illustrates continuing confusion over a question on which courts of appeals have affirmatively requested further guidance from this Court.

1. *Conflict With the Seventh Circuit.* The Illinois Supreme Court's "essential element" test conflicts with

[29] *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (addressing meaning of "relating to" in ERISA preemption provision); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (same); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (same); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) (same); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (same); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (same); *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (same); *Massachusetts v. Morash*, 490 U.S. 107 (1989) (same); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (same); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (same); *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992) (same).

[30] This conclusion, based on no evidence in the record, ignores the contrary conclusion of the United States Department of Transportation. *See* pages 26-29 *infra*.

the test adopted by the Seventh Circuit in *Statland v. American Airlines, Inc.*, 998 F.2d 539, *cert. denied*, 114 S. Ct. 603 (1993).

For purposes of Section 1305 preemption, the claims at issue in *Statland* directly parallel the claims at issue here. In *Statland*, as in this case, the plaintiff sought compensatory and punitive damages. In *Statland*, as in this case, the plaintiff claimed that insufficient *notice* triggered liability under the Illinois Consumer Fraud Act and the common law of contract. In particular, the plaintiff claimed that American's express reservation of the right to retain a 10% cancellation penalty was insufficiently clear as to whether 10% of the tax was included in the penalty, and that it would therefore violate Illinois law to permit American to retain 10% of the tax. Thus, in both *Statland* and in this case, the issue was whether damage claims under the Illinois Consumer Fraud Act and common law of contract, based on allegedly inadequate notice of the rights reserved by American, were preempted by Section 1305.

Applying *Morales*, the Seventh Circuit held it was "obvious" these state law claims were related to airline rates, routes or services. *Statland*, 998 F.2d at 542. The conduct challenged in *Statland*—withholding 10% of the tax portion of a ticket price as part of a cancellation penalty—is not "essential" to an airline's operation, yet the Seventh Circuit had no difficulty concluding that the claims were preempted.

The Illinois Supreme Court's decision also conflicts with the Seventh Circuit's earlier decision in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) —a case cited with approval in *Morales*. 112 S. Ct. at 2039. *Illinois Corporate Travel* involved a provision in American's contracts with travel agents which prohibited those agents from advertising that they offered rebates of the commissions earned on the sale of American's tickets.

899 F.2d at 752. That provision is not an "essential element" of airline operations, but the Seventh Circuit nevertheless ruled that challenges to that provision were preempted.[31]

The conflict between the Seventh Circuit and the Illinois Supreme Court is particularly troubling because identical statutory and common law claims would not be preempted in state court under the Illinois Supreme Court's test but would be preempted under the Seventh Circuit's test. A conflict of this nature is intolerable. It leaves the preemptive effect of federal law on actions brought in Illinois dependent solely on the forum in which the action is brought, thus encouraging forum shopping. Review is especially warranted because the very issue on which the Illinois Supreme Court and the Seventh Circuit have divided—the scope of preemption under Section 1305—itself involves the proper relationship between federal and state regulatory authority. The state court is construing the congressional command narrowly to preserve state regulatory power, while the federal courts are construing it broadly to effectuate the deregulatory goals of Congress. As a practical matter, the availability of nationwide class actions means that the Illinois Supreme Court's decision will thwart federal policy on a national basis, and not merely within Illinois.

2. *Other Conflicts.* The Illinois Supreme Court's interpretation of Section 1305 also conflicts with *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992). In *Federal Express*, the Ninth Circuit held that Section 1305 preempts state regulation of ground transportation aspects of an airline's express delivery service. Had it applied the Illinois Supreme Court's "essential element" test, the Ninth Circuit could not have reached the result it did, because the ground transportation services of an air express delivery service are not essential elements of airline operations.[32]

The Illinois Supreme Court's decision also conflicts with *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, in which the Fifth Circuit noted that Section 1305 was intended to "secure by federal preemption the benefits of economic deregulation of the airline industry," and thus should preempt all state claims relating to "the contractual arrangement between the airline and the user of the service." *Id.* at 354.[33] *See also O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. US Air, Inc.*, 818 F.2d 49 (D.C. Cir. 1987).

Further guidance from this Court is plainly needed. In *West*, the Ninth Circuit noted that *Morales* "does not provide much guidance to courts which must decide which state laws" are preempted and which are not. 995 F.2d at 151. The *Hodges* court expressly acknowledged that the claims at issue in *West* "would be pre-empted under [its] interpretation" of Section 1305. 4 F.3d at 356. The frequent flyer claims at issue in this case (as well as the claim at issue in *West*) would certainly be prempted

[31] In *Illinois Corporate Travel*, the Seventh Circuit (per Easterbrook, J.) held that damage claims asserted under the Illinois Consumer Fraud Act and under a common law contract theory were preempted by Section 1305. 889 F.2d at 754. The Court's decision in *Morales*, and in particular its citation with approval of Judge Easterbrook's analysis in *Illinois Corporate Travel*, makes clear that the Seventh Circuit's approach implements congressional intent.

[32] This Court's decision to deny certiorari in *Federal Express*, which had been held pending *Morales*, casts further doubt on the Illinois Supreme Court's conclusion that its "essential element" test is consistent with *Morales*.

[33] At the invitation of the *Hodges* panel, the Fifth Circuit has recently granted rehearing en banc in *Hodges* to consider whether Section 1305 preemption should extend beyond "contractual arrangements" to preempt state law personal injury claims for accidents occurring in the course of air travel. 4 F.3d at 356.

under the Fifth Circuit's *Hodges* test, as well as the Seventh Circuit's analysis in *Statland* and *Illinois Corporate Travel.*[34] Thus, the Illinois Supreme Court and the Ninth Circuit have adopted an interpretation of Section 1305 that conflicts directly with the governing interpretation in the Seventh Circuit, and the Fifth Circuit's interpretation in *Hodges.*

B. Form of Relief.

The Illinois Supreme Court held that Section 1305 preempted respondents' injunctive claims, but not respondents' compensatory and punitive damage claims, because the damage claims would not "establish" rates, "determine" routes or "dictate" services. This aspect of the court's decision conflicts directly with this Court's rulings under other statutory schemes in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959), and *International Paper Co. v. Oullette*, 479 U.S. 481, 498 n.19 (1987), all of which rejected any distinction between injunctive and damages relief for preemption purposes. The Illinois Supreme Court's decision also conflicts with the rulings of two federal courts of appeals. Thus, despite this Court's rulings under other statutory schemes, the lower courts remain divided over this question with respect to Section 1305.

1. *Conflict with the Seventh Circuit in Statland.* The Illinois Supreme Court's ruling conflicts with *Statland* on the form of relief issue. The plaintiff in *Statland* sought compensatory and punitive damages—but not injunctive relief—under the Illinois Consumer Fraud Act and state common law of contract, arising from Ameri-

[34] The respondents in *West* acknowledged as much in their Brief in Response to the Petition for Certiorari, No. 93-803, at 8 (*"Statland's* broad reading of Section [1305] suggests that the Seventh Circuit would find claims such as Mr. West's preempted."); *see also id.* ("wherever the Fifth Circuit may draw the line between preempted and nonpreempted claims, Mr. West's claims would be preempted in that Circuit").

can's alleged failure to provide adequate notice that its 10% penalty for cancelled tickets would include 10% of the tax as well as 10% of the ticket's base price. Because the notice was inadequate, the plaintiff contended, American was under both a binding contractual obligation and an enforceable statutory duty to refund the portion of the cancellation penalty representing 10% of the tax. The Seventh Circuit held that those damages claims were preempted, even though they would not "establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide."

2. *Conflict With West.* The Illinois Supreme Court's ruling that Section 1305 does not preempt *punitive* damage awards also conflicts with the Ninth Circuit's ruling on remand in *West v. Northwest Airlines, Inc.* In *West*, the Ninth Circuit held that Section 1305 did not preempt compensatory damages for breach of contract claims resulting from a challenge to airline overbooking practices, but *did* preempt punitive damages for the same conduct. Recognizing that punitive damages serve regulatory ends, the *West* court held that punitive damages seek to punish airlines for "accepted forms of price competition," and thus "relate to" rates and services within the meaning of Section 1305. 995 F.2d at 152. In the present case, the Illinois Supreme Court held that *both* compensatory *and* punitive damages were not sufficiently "related to" airline rates, routes, or services because they did not have a regulatory effect. The punitive damages preserved by the Illinois Supreme Court would plainly be preempted in the Ninth Circuit.[35]

[35] Other circuits have held that Section 1305 preempts damage awards as well as injunctive relief, without specifically considering whether the preemption analysis should differ depending on the form of relief requested. *E.g. O'Carroll v. American Airlines, Inc.*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989); *Anderson v. US Air, Inc.*, 818 F.2d 49 (D.C. Cir. 1987). The Illinois Supreme Court's ruling conflicts with those decisions as well.

* * * * *

This case presents a better vehicle than *West* (petition and cross petition pending, Nos. 93-803, 93-901) to address these issues. The Illinois Supreme Court's ruling raises the specific questions identified in the petition and cross-petition for certiorari in *West*—whether compensatory damages "relate to rates, routes, or services," and whether Section 1305 preempts punitive damages even if compensatory damages are not preempted. But the Illinois Supreme Court's ruling also raises the closely related, but broader and more important question whether Section 1305 should apply differently to damage awards than to injunctive relief. Thus, in this case the Court can resolve all issues involving the relevance under Section 1305 of the form of relief requested. In addition, the present case directly raises the question on which the Fifth and Ninth Circuits are in conflict: whether Section 1305 preempts all claims relating to the contractual relationship between the passenger and the airline, or only some subset of those claims. Although *West* may be resolved by the specific interpretation of a particular federal regulation unique to overbooking (the conduct at issue in *West*), this case involves no such complicating factor and thus presents the issues cleanly.

III. THE ILLINOIS SUPREME COURT'S RULING CREATES DIVERGENT FEDERAL AND STATE REGULATORY POLICIES FOR FREQUENT FLYER PROGRAMS, AND DEPARTS FROM THE UNITED STATES DEPARTMENT OF TRANSPORTATION'S INTERPRETATION OF SECTION 1305.

In 1992 the Department of Transportation issued an opinion and order that (a) rejected a complaint brought under Section 411 of the Federal Aviation Act[36] challenging certain features of airline frequent flyer programs, and (b) dismissed a request for rulemaking under Section

[36] Section 411 of the Act, 49 U.S.C. § 1381, authorizes the Department to prohibit "unfair or deceptive practices" in the provision of air transportation.

411 relating to the same issues. DOT Order No. 92-5-60 (May 29, 1992); App. 85a. The complaint alleged that several airlines had engaged in deceptive and unfair trade practices by failing to provide reasonably adequate notice that they reserved the right to adjust frequent flyer award levels and to impose capacity controls and blackout dates. App. 86a-87a. In support of those claims the complaining parties argued that the airline practices violated the NAAG Guidelines for frequent flyer programs. App. 88a.

The DOT determined that the claims were unsupported. There was no evidence of "actual or potential deception" and no showing that "the actual notice given by any carrier is in fact inadequate." App. 97a. DOT noted that "the carriers use their [frequent flyer] programs as a means of competing for passengers" and that "[s]ince the programs began, each carrier has greatly *expanded* the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive." App. 99a (emphasis added). DOT specifically found that the challenged program features—adjusting award levels, and imposing capacity controls and blackout dates—are not unfair to consumers. To the contrary, these features "appear to be legitimate methods for controlling the cost of frequent flyer programs," without which airlines might be forced to curtail or eliminate such programs, to the great detriment of consumers. App. 100a. As this Court has recently made clear, DOT's views regarding the reasonableness of airline competitive practices warrant "substantial deference" because DOT "is equipped, *as courts are not*, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc. v. County of Kent*, No. 92-97, 1994 WL 13651, at *6 (January 24, 1994) (Slip Op. at 9-11) (emphasis added).

The decision of the Illinois Supreme Court, however, permits state court damages challenges to the same fea-

tures of frequent flyer programs that were endorsed in the DOT proceedings. Because challenges to an airline's operation of frequent flyer programs will be resolved differently under state consumer fraud statutes (which incorporate the NAAG Guidelines) than under the federal consumer fraud provision applicable to airlines, complaints against frequent flyer practices will certainly be channelled to state courts, with the result that state and federal policies will be in direct conflict.

The DOT's 1992 order is powerful additional evidence that the Illinois Supreme Court has misinterpreted Section 1305, and seriously undermined the goals of the Airline Deregulation Act. In *Morales* this Court recognized that Section 1305 was intended to "ensure that the States would not undo federal deregulation" through the application of their own laws. 112 S. Ct. at 2034. Permitting individual States to punish and deter airline conduct DOT has viewed with approval strikes at the heart of the congressional objectives, and threatens to destroy the interstate "uniformity" for "rates, routes, and services" that is critical to the congressional plan.

Furthermore, DOT plainly indicated, if it did not hold, that Section 1305 would preempt the challenges at issue in that proceeding had they been raised as state law breach of contract claims. As DOT stated:

> state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's [frequent flyer] program are fair and reasonable to the extent they relate to an airline's rates, routes or services. Such state regulation is pre-empted under section 105 [49 U.S.C. § 1305] of the Act.

App. 102a.[37] DOT's interpretation of the preemptive scope of Section 1305 is entitled to substantial deference. *See*

[37] DOT adopted this interpretation of Section 1305 in response to the argument that federal rules for frequent flyer programs were needed to avoid inconsistent patchwork regulation by the States through statutory and common law claims. The claimants argued that absent federal regulation, state courts might "in effect regulate the [frequent flyer] programs through their adjudication of individual contract suits," resulting "in each state having its own rules." DOT determined, however, that uniform federal regulation was not necessary because Section 1305 would preempt such state claims, and would thus prevent the development of a body of inconsistent and conflicting obligations under state law. App. 102a.

Massachusetts v. Morash, 490 U.S. 107, 116-17 (1989) (deferring to agency interpretation of ERISA preemption language). Accordingly, DOT's order confirms what the statutory text and this Court's ruling in *Morales* make plain: the Illinois Supreme Court's reading of Section 1305 is insupportable and creates an intolerable conflict with federal policy.

CONCLUSION

The petition for certiorari should be granted, and the judgment of the Illinois Supreme Court should be summarily reversed. Alternatively, the case should be set for plenary consideration.

Respectfully submitted,

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February 8, 1994

APPENDICES

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APPENDIX A

SUPREME COURT OF ILLINOIS

Docket No. 71418—Agenda 9—May 1993

MYRON (MIKE) WOLENS *et al.*,
Appellees,

v.

AMERICAN AIRLINES, INC.,
Appellant.

JUSTICE BILANDIC delivered the opinion of the court:

This cause comes to us on remand from the United States Supreme Court for further consideration in light of the decision in *Morales v. Trans World Airlines, Inc.* (1992), 504 U.S. ——, 119 L. Ed. 2d 157, 112 S. Ct. 2031.

In 1988, plaintiffs filed a class action in the circuit court of Cook County on behalf of participants in American's "AAdvantage" frequent flyer program. Under the program, American awards mileage credits to participating frequent flyers who receive free or discounted flights and other travel benefits based upon their accumulated mileage credits. The complaint alleged that American's retroactive modification of the rules of the AAdvantage program constituted a breach of contract with plaintiffs and all others who joined the program prior to May 1988, and violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (Ill. Rev. Stat. 1987, ch. 121½, par. 261 *et seq.*). Plaintiffs sought money damages and an injunction preventing retroactive application to mileage credits earned prior to the changes.

The trial court denied defendant's motion to dismiss, finding that section 1305 did not preempt plaintiffs' claims; however, the trial court granted American's motion for certification for interlocutory review pursuant to our Rule 308 (184 Ill. 2d R. 308). The appellate court concluded that plaintiffs' attempt to enjoin American's application of its new AAdvantage program rules would constitute an attempt to regulate the service of an airline and was therefore preempted. (*Wolens v. American Airlines* (1990), 207 Ill. App. 3d 35, 39.) The court found, however, that plaintiffs' damage claims were not barred by section 1305 of the Deregulation Act. *Wolens,* 207 Ill. App. 3d at 39.

The appellate court issued a certificate of importance to permit immediate review by this court pursuant to our Rule 316 (134 Ill. 2d R. 319). This court affirmed the conclusion of the appellate court that plaintiffs' claim for injunctive relief was preempted by section 1305(a)(1) of the Deregulation Act. (*Wolens v. American Airlines, Inc.* (1992), 147 Ill. 2d 367.) Plaintiffs' claim for damages for breach of contract and violation of the Consumer Fraud Act survived, however. Plaintiffs' claim for money damages had only a tangential relation to defendant's rates and services; thus, this court found that the claim was not preempted under section 1305(a)(1).

Following this court's issuance of its opinion in *Wolens,* only American petitioned the United States Supreme Court for a writ of *certiorari.* The Court vacated the judgment of this court, and remanded this cause for further consideration in light of *Morales.* (*American Airlines, Inc. v. Wolens* (1992), —— U.S. ——, 121 L. Ed. 2d 6, 113 S. Ct. 32.) We find this court's decision addressing plaintiffs' claim for injunctive relief is consistent with the *Morales* ruling, thus, we do not disturb that portion of this court's previous opinion. Therefore, the only issue before this court is whether plaintiffs' claim for money damages for breach of contract and violation of the Consumer Fraud Act are preempted by section 1305(a)(1) of the Deregulation Act.

I

We begin our analysis with a review of the *Morales* decision. In *Morales,* the Supreme Court considered whether section 1305(a)(1) preempted the enforcement of State statutes regulating airline fare advertising based upon guidelines promulgated by the National Association of Attorneys General, which included the Illinois Attorney General.

Section 1305(a)(1) provides in pertinent part:

> "[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." 49 U.S.C. § 1305(a)(1) (1988).

The *Morales* court noted that the ordinary meaning of the phrase "relating to" is a broad one, that is, " 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.' " (*Morales,* 504 U.S. at ——, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037, quoting Black's Law Dictionary, 1158 (5th ed. 1979).) The Court compared the language in the Deregulation Act to a similarly worded preemption provision found in the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1144(a) (1988), which preempts all State laws " 'insofar as they . . . relate to any employee benefit plan.' " (*Morales,* 504 U.S. at ——, 119 L. Ed. 2d at 167, 112 S. Ct. at 2087, quoting 28 U.S.C. § 1144(a) (1988).) Adopting the same interpretation employed in the ERISA actions, the Court held that State enforcement actions having a "*connection with or reference* to airline 'rates, routes, or services' are pre-empted under [section] 1305(a)(1)." (Emphasis added.) *Morales,* 504 U.S. at——, 119 L. Ed. 2d at 167-68, 112 S. Ct. at 2037.

While the Court concluded that fare guidelines are pre-empted under section 1305(a)(1), it nonetheless held that, in spite of such a broad interpretation of the "relates to" language, all State laws would not be preempted. As stated in *Morales*:

> "In concluding that the * * * fare advertising guidelines are pre-empted, we do not * * * set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertisng (for example, state laws preventing obscene depictions) would similarly 'relat[e] to' rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw*, '[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect.'" *Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 171-72, 112 S. Ct. at 2040, quoting *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 100 n.21, 77 L. Ed. 2d 490, 503 n.21, 103 S. Ct. 2890, 2901 n.21.

The *Morales* Court found the fare guidelines at issue did not present a borderline question; as such, the Court expressed no view " 'about where it would be appropriate to draw the line' " as to the types of actions that would be preempted by section 1305(a)(1). (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040, quoting *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 100 n.21, 77 L. Ed. 2d 490, 503 n.21, 103 S. Ct. 2890, 2901 n.21.) Moreover, the Court noted, the decision "does not give the airlines *carte blanche* to lie to and to deceive consumers; the [Department of Transportation] retains the power to prohibit advertisements which in its opinion do not further competitive pricing." (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040. See also 49 U.S.C. app. § 1381 (1988) (granting the Department of Transportation authority to investigate unfair trade practices in the airline industry).

The *Morales* Court concluded that the guidelines regarding airline fare advertising were expressly preempted by section 1305(a)(1). The Court found that the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares charged. (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 171, 112 S. Ct. at 2040.) Thus, since the guidelines related directly to airline rates, the Attorneys General were precluded from enforcing the guidelines against the airlines.

II

Morales instructs that, in order to determine whether the plaintiffs' claims for breach of contract and violation of the Consumer Fraud Act are preempted, we must decide whether those claims have a " 'connection with or reference to airline 'rates, routes, or services.' " (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 167-68, 112 S. Ct. at 2037, quoting 49 U.S.C. app. § 1305(a) (1988).) As noted, however, the *Morales* Court expressly stated that certain State actions may be too tenuously or remotely related to an airlines' rates, routes, or services to have a preemptive effect. (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 172, 112 S. Ct. at 2040.) It appears, therefore, that the *Morales* Court intended to leave open the possibility that certain State law actions that had only a slight connection to an airlines' rates, routes, or services, would not be preempted by section 1305(a)(1).

In their complaint, plaintiffs contend that the AAdvantage frequent flyer program was developed as a marketing device for the purpose of encouraging greater use of airline facilities by the general public and, more particularly, by frequent travelers. Prior to May 18, 1988, plaintiffs were entitled to redeem their AAdvantage award certificates for free air travel on any available date to applicable destinations for any available seat in the class of service provided. After that time, American retroactively altered the terms of its contract with the AAdvantage

program members by instituting various restrictions on previously earned AAdvantage credits. Plaintiffs do not challenge American's right to alter or restrict aspects of the AAdvantage program prospectively; however, they contend that American never reserved the right to make such changes retroactive so as to diminish the value of previously earned AAdvantage credits.

Pursuant to *Morales*, we find that the claims at issue do not relate to the rates, routes, or services of an airline. A frequent flyer program is not an essential element to the operation of an airline. Indeed, the airline industry functioned successfully for decades prior to providing incentives to its travelers in the form of frequent flyer programs. As noted in Chief Justice Miller's special concurrence to our previous opinion, plaintiffs' claims do not seek to "establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." (*Wolens*, 147 Ill. 2d at 377.) Instead, the plaintiffs here seek only money damages for breach of contract and violation of the Consumer Fraud Act after American implemented retroactive changes to the terms of its frequent flyer program.

When a member earns frequent flyer miles by flying on American or by doing business with American affiliates, a contractual relationship is formed which vests the frequent flyer with the right to earn specific travel awards. American chose to retroactively alter the terms of the frequent flyer program. This action constituted a breach of contract which entitled plaintiffs to pursue an available remedy. 12A Ill. L. & Prac. *Contracts* § 391 (1983).

Accordingly, we conclude that our previous holding, that plaintiffs' claims for money damages was not preempted because it bears only a tangential relation to airline rates, routes, and services, comports with the *Morales* decision. As defined, the word "tangential" is described as: "touching lightly or in the most *tenuous* way: Incidental." (Emphasis added.) (Webster's Third New International Dictionary 2337 (1986).) In view of our finding that frequent flyer programs are peripheral to the operation of an airline, it follows that plaintiff's State law claims for money damages bear only a tangential, or tenuous, relation to American's rates, routes, and services.

For the foregoing reasons, we find that plaintiffs' claims for breach of contract and violation of the Consumer Fraud Act are not preempted by section 1305(a)(1) of the Deregulation Act. The claims are excluded by the exception carved out in *Morales* for actions only tenuously connected to the airlines' rates, routes, and services. Therefore, the judgment of the appellate court affirming the circuit court's denial of American's motion to dismiss under section 2—615 of the Code of Civil Procedure (Ill. Rev. Stat. 1987, ch. 110, par. 2—615) is affirmed.

Appellate court affirmed.

JUSTICE FREEMAN took no part in the consideration or decision of this case.

JUSTICE McMORROW, dissenting:

I respectfully dissent because, in my view, under the reasoning and holding of the *Morales* case, plaintiffs' claims for damages under the Consumer Fraud Act and for breach of contract are preempted by section 1305(a)(1) of the Airline Deregulation Act.

I

In 1987 and 1988, the National Association of Attorneys General (NAAG) drafted detailed standards governing the advertising and marketing practices of the airline industry. The purpose of the guidelines, according to the NAAG, was to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 175, 112 S. Ct. at 2041 (appendix, NAAG Guidelines, Introduction (1988).) Notwithstanding objections to the guidelines, on preemption and policy grounds, by the Depart-

ment of Transportation and by the Federal Trade Commission, seven members of the NAAG sent memoranda to the airlines stating that the practice of not disclosing all surcharges in airlines fare advertisements was a violation of the members' respective State laws on deceptive advertising and trade practices. Some months later, the Texas Attorney General's office sent the airlines notice of its intent to sue under Texas' statute prohibiting deceptive advertising and trade practices for the airlines' failure to disclose all surcharges in their advertisements. The airlines filed suit in the district court seeking declaratory judgment and injunctive relief from any action by Texas in conjunction with the NAAG guidelines on the basis that section 1305(a)(1) expressly preempted actions to enforce State deceptive advertising laws.

As noted by the majority, in analyzing the language of section 1305 prohibiting the States from enacting or enforcing "any law relating to the rates, routes, or services of any air carrier," the *Morales* Court imparted a broad definition to the phrase "relating to." The *Morales* Court additionally observed that ERISA's similarly worded preemption provision (29 U.S.C. § 1144(a) (1988)) had repeatedly been recognized as having a " 'broad scope' " and an " 'expansive sweep' " and being " 'conspicuous for its breadth.' " (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037, quoting *Metropolitan Life Insurance Co. v. Massachusetts* (1985), 471 U.S. 724, 739, 85 L. Ed. 2d 728, 739-40, 105 S. Ct. 2380, 2388-89; *Pilot Life Insurance Co. v. Dedeaux* (1987), 481 U.S. 41, 47, 95 L. Ed. 2d 39, 48, 107 S. Ct. 1549, 1553; *FMC Corp. v. Holliday* (1990), 496 U.S. 52, 58, 112 L. Ed. 2d 356, 364, 111 S. Ct. 405, 407.) The Court noted that it has been held that a State law " 'relates to' " an employee benefit plan and is preempted by ERISA " 'if it has a connection with or reference to such a plan.' " (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037, quoting *Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 95, 97, 77 L. Ed. 2d 490, 501, 103 S. Ct. 2890, 2900.) The *Morales* Court determined that

because the relevant language of section 1305(a)(1) of the Deregulation Act is identical to the preemption clause in ERISA, it should be given the same broad interpretation. The *Morales* Court thus held that State enforcement actions having a connection with or reference to airline rates, routes, or services are preempted under section 1305(a)(1). *Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 167-68, 112 S. Ct. at 2037.

The Court rejected the argument that its ruling should be limited to State laws expressly addressing the airline industry (the position taken by this court in the original *Wolens* opinion), reasoning that such a limitation would create "an utterly irrational loophole * * * [which] ignores the sweep of the 'relating to' language." (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 169, 112 S. Ct. at 2035.) The Court noted that it had consistently rejected the same argument in ERISA cases, having held that " '[a] state law may "relate to" a benefit plan, and thereby be preempted even if the law is not specifically designed to affect such plans, or the effect [sic] is only indirect.' " *Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 169, 112 S. Ct. at 2038, quoting *Ingersoll-Rand Co. v. McClendon* (1990), 498 U.S. 133, 139, 112 L. Ed. 2d 474, 484, 111 S. Ct. 478, 483.

The *Morales* Court also rejected a contention essentially the same as that made by Justice Miller in his special concurrence to this court's previous opinion and now adopted by the majority, that plaintiffs' claims are not preempted because they do not seek to " 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.' " (Slip op. at 4, quoting *Wolens*, 147 Ill. 2d at 377.) The *Morales* Court observed that the argument that section 1305(a)(1) only preempts the States from actually prescribing rates, routes, or services "simply reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes,

and services.'" (Emphasis in original.) *Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 168, 112 S. Ct. at 2037.

The Court then examined the NAAG guidelines on fare advertising and concluded that they "quite obviously" related to fares. In addition to requiring that all restrictions and surcharges be disclosed clearly and conspicuously, the guidelines also mandated that an advertised fare be available in sufficient quantities to meet reasonably foreseeable demand on every flight on every day in every market in which the fare is advertised or that the advertisement prominently state the extent of the unavailability. The Court found that each guideline bore a reference to air fares, and that under the Texas statute "violations of these requirements would give consumers a cause of action (for at least actual damages [citation]) for an airline's failure to provide a particular advertised fare—effectively creating an enforceable right to that fare when the advertisement fails to include the mandated explanations and disclaimers." (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 170, 112 S. Ct. at 2039.) Continuing, the *Morales* Court compared the case before it to *Pilot Life Insurance Co.*, 481 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1649 which "held that a common-law tort and contract action seeking damages for the failure of an employee benefit plan to pay benefits 'relate[d] to' employee benefit plans and was preempted by ERISA." (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 170, 112 S. Ct. at 2039.) Beyond the guidelines' express reference to fares, the *Morales* Court found that the obligations imposed by the guidelines "would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." *Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 171, 112 S. Ct. at 2040.

Although the *Morales* Court held that the NAAG guidelines were preempted by section 1305(a)(1), the Court pointed out that the Department of Transportation retains the power to prohibit deceptive advertising practices. (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 172,

112 S. Ct. at 2040.) Under section 411 of the Federal Aviation Act (49 U.S.C. app. § 1381 (1988)), the Department has the authority to investigate and determine whether any air carrier is or has been engaged in unfair or deceptive practices and to order the air carrier to cease and desist from such practices.

II

In the instant case, plaintiffs' complaints consist of two separate claims, one under the Consumer Fraud Act and one for breach of contract. Illinois' Consumer Fraud Act makes unlawful "unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact * * * in the conduct of any trade or commerce." (Ill. Rev. Stat. 1987, ch. 121½, par. 262.) The Act authorizes the Attorney General or a State's Attorney to bring an action to restrain by injunction the unfair act or practices, and to seek civil penalties against any person found by the court to have engaged in an unlawful act or practice. (Ill. Rev. Stat. 1987, ch. 121½, par. 267.) Like the Texas consumer protection statute sought to be enforced in *Morales*, the Illinois Consumer Fraud Act also allows individuals to bring actions for damages for violations of its provisions. Ill. Rev. Stat. 1987, ch. 121½, par. 270(a).

Plaintiffs' consumer fraud claims sought an injunction and both actual and punitive damages. In their complaints plaintiffs allege that American solicited the use of its airline by "featuring" its AAdvantage program in mailings and in the distribution of promotional materials which contained a delineation of the mileage credits required to obtain specific benefits, and that through these materials American induced persons to join the AAdvantage program. Plaintiffs further allege that they were

induced by American's solicitations and promises to believe that by accumulating mileage credits they would receive correspondingly greater travel benefits. Plaintiffs allege that American offered these inducements even though it knew that it would change the terms of the program and institute capacity control restrictions which would have the effect of substantially reducing the value of accumulated mileage credits, and that American never advised plaintiffs that it believed it had reserved the right to retroactively restrict or otherwise reduce or alter the benefits available under the program.

When reduced to their simplest terms, plaintiffs' claims for damages, including punitive damages, under the Consumer Fraud Act are based upon allegations of American's deceptive advertising, promotions, and inducements relating to airline fares (*i.e.*, payment of travel fares with mileage credits and upgrades in seating class) and services (*i.e.*, the quantity of seats and flights and the dates of travel to various destinations) which would be available to persons who joined and participated in the AAdvantage program.

Plaintiffs' allegations virtually mirror the restrictions regarding the advertising of frequent flyer benefits and the institution of capacity controls and other frequent flyer program modifications without advance notice which were proposed in the NAAG guidelines on frequent flyer programs. (*Morales*, 504 U.S. at ——, 119 L. Ed. 2d at 173, 112 S. Ct. at 2041 (appendix, NAAG Guidelines).) Although *Morales* involved those of the guidelines relating to advertisements of discounted fares rather than of frequent flyer program benefits; as in *Morales*, plaintiffs in the case at bar seek an adjudication that American's advertising of and representations concerning frequent flyer fares and services constituted unfair and deceptive practices, in violation of State law. *Morales* held that actions seeking to enforce State consumer protection statutes referring and relating to fares and services are ex-

pressly preempted by section 1305(a)(1). *Cf. Hastalis v. Human Rights Comm'n* (1990), 205 Ill. App. 3d 50 (plaintiff's discrimination complaint under the Illinois Human Rights Act related to services of the airline and was preempted by section 1305(a)(1)).

Applying *Morales*' expansive and sweeping interpretation of the phrase "relating to," I believe that plaintiffs' claims for compensatory and punitive damages based on allegations of common law breach of contract are likewise preempted by section 1305(a)(1). Plaintiffs allege that prior to May 1988, AAdvantage members, numbering approximately four million persons, were entitled to redeem their award certificates for free air travel on any available date to applicable destinations for any available seat in the class of service provided. Although plaintiffs maintain that they are not attempting to mandate enforcement of the pre-May 1988 terms of the AAdvantage program, in order to prevail on their breach of contract claims plaintiffs must obtain a State-court adjudication that American is contractually obligated to continue to redeem mileage credits earned prior to May 1988 for the same free fares and unrestricted seating and flight services which the AAdvantage program provided up until that time. Such a finding is necessary whether plaintiffs seek to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations.

I find it significant that the *Morales* Court several times cited to the decision in *Pilot Life Insurance Co.*, 481 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549. In that case, the plaintiff brought suit seeking damages for common law tort and breach of contract based upon the insurance company's improper processing of his claim for and failure to pay disability benefits on the group insurance policy purchased with matching funds of the employer and employees. The Court held that the common law causes of action raised in the plaintiff's complaint "undoubtedly meet

the criteria for preemption" under the "relating to" language in ERISA's preemption clause. This court reached the same conclusion in *Arnold v. Babock & Wilcox Co.* (1988), 123 Ill. 2d 67. In *Wilcox,* the plaintiffs' employer sold the plant where they worked and the plant subsequently closed. Plaintiffs filed an action for breach of contract to recover severance benefits to which they claimed entitlement under the terms of their employment contract. The complaint also alleged that the failure to pay the benefits constituted a violation of the State statute governing the payment of wages. The court held that the plaintiff's State-law causes of action based on breach of contract and violation of the State wage payment law came within the broad scope of ERISA's preemption of any and all laws which relate to an employee benefit plan. *Wilcox,* 123 Ill. 2d at 72-73.

Morales makes clear that the "relating to" language in section 1305(a)(1) is as expansive in its scope as the identical language in ERISA. Several decisions rendered after *Morales* have applied that broad interpretation in cases against airlines. In *Statland v. American Airlines* (7th Cir. July 16, 1993), No. 92-2062, plaintiff bought a ticket which carried a 10% cancellation penalty. When she cancelled the ticket, American retained 10% of the tax she paid in addition to 10% of the ticket price. Plaintiff filed a class action suit that included four State-law claims alleging breach of fiduciary duty, violations of the Consumer Fraud Act, conversion and breach of contract, based upon the airline's alleged wrongful retention of 10% of the tax she paid. The court found it "obvious [that] canceled ticket refunds relate to rates" (*Statland,* slip op. at 5), and that under *Morales,* plaintiff's State statutory and common law claims were preempted by section 1305(a)(1).

In *Schaeffer v. Delta Air Lines, Inc.* (S.D. Cal. September 18, 1992), No. 92-1190-E(LSP), the plaintiff's complaint alleged consumer fraud and breach of contract

for the airline's failure to disclose in mailings to and oral communications with frequent flyer program members an increase in mileage requirements necessary to obtain a free flight. The complaint was found to be legally and factually deficient. The court stated, however, that even if the pleading deficiencies could be corrected by amendment, the action could not be sustained under the broad definition ascribed to the phrase "relates to" in *Morales.* The court found that the allegations *related to* both the advertisements and services of an airlines, and thus were preempted under section 1305(a)(1).

In *Vail v. Pan Am Corp.* (1992), 260 N.J. Super. 292, 616 A.2d 523, plaintiffs brought an action alleging fraud, consumer fraud, and breach of contract, charging that the airline falsely advertised that it was initiating an enhanced security program and charged $5 per ticket to defray the costs of the program when, in fact, the airline did not provide any such program. The complaint sought, *inter alia,* a refund of the $5 surcharge. Plaintiff argued that her claims were merely traditional actions for fraud and breach of contract which could have only a remote effect upon the rates and services of the airline. The *Vail* court found the broad interpretation given to section 1305(a)(1) by *Morales* was dispositive of plaintiff's claims, reasoning that if plaintiff's action were allowed, the State would be permitted to determine whether an airline's advertising was false and deceptive and whether the services advertised were in fact provided, and to fashion remedies, including proscribing certain advertising and compelling the airline to repay the surcharge portion of the rate charged. The court determined that plaintiff's claims related to the services and rates of the airlines and were, therefore, preempted under section 1305(a)(1). See also *Cannava v. USAIR, Inc.* (D. Mass. January 7, 1993), No. 91-3003-F (passenger's claims for intentional infliction of emotional distress, violations of State unfair practices statute and breach of an implied contractual obligation to provide courteous service

were preempted under the interpretation ascribed to section 1305(a)(1) in *Morales*).

I do not agree with the majority that plaintiffs' claims bear only a tangential, tenuous, or remote relation to American's rates, routes, and service because they do not seek to establish rates, determine routes or dictate the services American must provide. Plaintiffs' actions seek a State-court determination that American violated the Consumer Fraud Act through deceptive and unfair advertising and promotion of the AAdvantage program. Plaintiff's actions also seek a State-court adjudication that American has a contractual obligation to provide, and plaintiffs have an enforceable right to receive, either certain specific fares, flights and seats in exchange for earned mileage credits, or monetary compensation in lieu thereof. Under the rationale of *Morales* and its progeny, plaintiffs claims have a connection with and relation to American's rates and services, and are preempted by section 1305(a)(1) of the Deregulation Act.

I further dissent from the majority's statement that American's alteration of the terms of AAdvantage program "constituted a breach of contract which entitled plaintiffs to pursue an available remedy." (Slip op. at 4.) This case is before us on the denial of American's motion to dismiss. Thus, I believe that it is both premature and inappropriate to reach or address the merits of plaintiffs' claims.

APPENDIX B

IN THE SUPREME COURT OF ILLINOIS

No. 71418

MYRON (MIKE) WOLENS *et al.*, ETC.,
Appellees

v.

AMERICAN AIRLINES, INC., ETC.,
Appellant

AC1-89-0918
TR88CH7554
TR89CH119
Hon. Arthur L. Dunne, Judge Presiding

ORDER

[Filed Dec. 28, 1993]

This matter has come for consideration upon the motion of appellant to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United

States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ Michael A. Bilandic
Justice
Supreme Court of Illinois

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 92-249

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*

ON WRIT OF CERTIORARI to the Supreme Court of Illinois.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Supreme Court of Illinois for further consideration in light of *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. —— (1992).

IT IS FURTHER ORDERED that the petitioner, American Airlines, Inc. recover from Myron Wolens, et al., Three Hundred Dollars ($300.00) for their costs herein expended.

October 5, 1992

APPENDIX D

SUPREME COURT OF ILLINOIS

Docket No. 71418—Agenda 31—September 1991

MYRON (MIKE) WOLENS, *et al.*,
Appellees,

v.

AMERICAN AIRLINES, INC.,
Appellant.

[Filed Mar. 12, 1992]

JUSTICE HEIPLE delivered the opinion of the court:

This issue presented by this appeal stems from an action by plaintiffs against defendant American Airlines concerning benefits accumulated through defendant's frequent flyer program. Following denial of defendant's motion to dismiss, the trial court granted defendant's motion for certification for interlocutory appeal. The appellate court affirmed the order of dismissal. 207 Ill. App. 3d 35.

Plaintiffs are participants in defendant's American Airlines AAdvantage (AAdvantage) frequent flyer program. In 1988 they filed a class action against defendant, alleging that they enrolled in the AAdvantage program pursuant to a national membership campaign by defendant. Once enrolled, plaintiffs received various communications from defendant setting forth the benefits of the program and the mileage credits necessary for receipt of those benefits. Plaintiffs used defendant's airline, and used the facilities of other organizations that participated in the

AAdvantage program, including other airlines, hotels, and car rental companies, in order to accumulate mileage credits for use in the program. According to plaintiffs' complaint, the value of those credits was substantially and adversely affected by defendant, who retroactively reduced and restricted the benefits available, effective May 18, 1988.

Plaintiffs charged that defendant's action in retroactively modifying the rules of the AAdvantage program constituted a breach of defendant's contracts with plaintiffs and all others who joined the program prior to May 1988. The complaint also charged that the defendant's action was in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (Ill. Rev. Stat. 1987, ch. 121½, par. 261 *et seq.*). Plaintiffs sought money damages and an injunction preventing retroactive application of any changes in the program to mileage credits earned prior to the changes.

Defendant initially removed the action to the United States District Court for the Northern District of Illinois, arguing that the suit raised a Federal question exclusively committed to the adjudication of the Federal courts pursuant to section 1305(a)(1) of the Federal Aviation Act (49 U.S.C. § 1305(a)(1) (1988)). The district court remanded the action to the circuit court, concluding that the complaint raised State law contract and fraud claims, and that such claims are not converted into Federal actions by section 1305 or its legislative history. *Wolens v. American Airlines, Inc.* (N.D. Ill., Oct. 25, 1988), No. 88-C-8158.

On remand, defendant moved to dismiss plaintiffs' action and a second similar class action complaint which was filed following the district court decision and consolidated with the original action. Defendant moved to dismiss on the ground that plaintiffs' claims relate to defendant's rates and services and therefore are expressly preempted by section 1305 of the Federal Aviation Act.

Defendant moved to dismiss plaintiffs' Consumer Fraud Act claims on the ground that they are implicitly preempted by Federal regulation. Finally, defendant moved to dismiss plaintiffs' claims in their entirety on the ground that they are barred by the commerce clause because subjecting airlines to State consumer fraud and common law contract claims would impose a burden on interstate commerce.

The circuit court denied defendant's motion to dismiss on March 20, 1989, finding that section 1305 did not preempt plaintiffs' claims. On March 23, 1989, the circuit court granted defendant's motion for certification of the following question for interlocutory review pursuant to Supreme Court Rule 308 (134 Ill. 2d R. 308):

> "whether plaintiffs' claims are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1557, and by the federal regulations promulgated thereunder, and precluded under the Commerce Clause of the United States Constitution?"

The appellate court answered the question in the negative, and affirmed the decision of the trial court with respect to plaintiffs' breach of contract and Consumer Fraud Act claims, holding that their damage claims are not preempted by section 1305. The Court concluded, however, that the attempt to enjoin defendant's application of its new AAdvantage program rules would be an attempt to regulate the services of an airline and thus a violation of section 1305. The appellate court issued a certificate of importance to permit immediate review by this court, and this court assumes jurisdiction pursuant to article VI, section 4(c), of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, § 4(c)), and Supreme Court Rule 316 (134 Ill. 2d R. 316). We affirm.

Section 1305(a) provides in part:

> "[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule,

> regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." (49 U.S.C. § 1305 (a)(1) (1988).)

Plaintiffs request injunctive relief to halt application of defendant's new AAdvantage program rules. As the appellate court correctly concluded, injunctive relief would involve the regulation of defendant's services and therefore violate section 1305. See *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408.

Plaintiffs' claims for damages for breach of contract and violation of the Consumer Fraud Act, however, survive. We adopt the prevailing view, set forth in *West v. Northwest Airlines, Inc.* (9th Cir. 1990), 923 F.2d 657, that "section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services." (923 F.2d at 660. See also *Bieneman v. City of Chicago* (7th Cir. 1988), 864 F.2d 463.) The instant claims bear only a tangential relation to defendant's rates and services and are not expressly preempted.

Defendant also contends that plaintiffs' claims are implicitly preempted under section 1302(a)(7) of the Federal Aviation Act, which states that the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation shall be considered in the public interest and in accordance with the public convenience. Proof of implied preemption requires defendant to demonstrate that Congress intended to occupy the field and give Federal law exclusive authority. (*West v. Northwest Airlines, Inc.*, 923 F.2d at 661.) Nothing in the language of section 1302(a)(7) indicates an intent to foreclose State damage claims against an airline for engaging in deceptive practices. *New York v. Trans World Airlines* (S.D.N.Y. 1989), 738 F.Supp. 162.

Additionally, section 1506 of the Federal Aviation Act provides:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. app. § 1506 (1988).)

This language indicates that Congress did not intend to occupy the field, but rather that common law remedies were intended to survive. (*Bieneman v. City of Chicago*, 864 F.2d at 471; *West v. Northwest Airlines, Inc.*, 923 F.2d at 661.) Plaintiffs' claims are not implicitly preempted.

Finally, defendant argues that plaintiffs' claims are barred by the commerce clause. Injunctive relief, defendant contends, will result in State regulation of interstate commerce. In light of our conclusion that an attempt to enjoin defendant's actions regarding the AAdvantage program would constitute improper State regulation preempted by section 1305, further discussion of defendant's commerce clause argument is unnecessary.

Federal and State courts have repeatedly refused to interpret the Federal Aviation Act so as to preempt all State laws. Courts have carefully and narrowly construed the applicable law so as to preempt only those State laws and regulations that specifically relate to and have more than a tangential connection with an airline's rates, routes or services. These courts have recognized that Congress did not intend section 1305 to be construed as a blanket preemption provision, and we join in this conclusion. While plaintiffs' claims for injunctive relief are expressly preempted by the language of section 1305, their damage claims for breach of contract and violation of the Consumer Fraud Act survive.

Accordingly, the circuit and appellate court decisions are affirmed.

Judgments affirmed.

JUSTICES CLARK and FREEMAN took no part in the consideration or decision of this case.

CHIEF JUSTICE MILLER, specially concurring:

The majority concludes that section 1305(a)(1) of the Federal Aviation Act (49 U.S.C. § 1305(a)(1) (1988)) does not expressly preempt the plaintiffs' State-law-based claims for damages. As the sole support for this holding, the majority opinion asserts that the Federal statute preempts only State laws that are specifically directed at the airline industry and does not affect laws of general application, like those at issue here. Although I agree with the majority's conclusion, I cannot subscribe to its rationale.

Unlike the majority, I am not persuaded that Federal preemption exclusively turns on a determination of whether the State law at issue is general or specific in its focus and operation. Although State laws specifically addressing activity that is the subject of an express preemption provision will be preempted (see *Mackey v. Lanier Collections Agency & Service, Inc.* (1988), 486 U.S. 825, 829-30, 100 L. Ed. 2d 836, 843-44, 108 S. Ct. 2182, 2185), not every State law having general application is automatically saved from preemption. Indeed, one apparent and unsustainable consequence of the majority's reasoning would be to shield from preemption all common law actions and remedies, which by their nature have general application. The general nature of a State law can be a circumstance arguing against preemption, but that characteristic alone will not be determinative. See *Ingersoll-Rand Co. v. McClendon* (1990), 498 U.S. ——, ——, 112 L. Ed. 2d 474, 484, 111 S. Ct. 478, 483.

One need not look far to find, in this or other contexts, Federal preemption of State or other local laws having general application. For example, statutes or common law remedies, even though not aimed directly or entirely at airlines, may not be used to control the seating of aircraft passengers. (See *O'Carroll v. American Air-*

lines, Inc. (5th Cir. 1989), 863 F.2d 11; *Anderson v. USAir, Inc.* (D.C. Cir. 1987), 818 F.2d 49; *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408; *Hastalis v. Human Rights Comm'n* (1990), 205 Ill. App. 3d 50.) These cases surely demonstrate that not every law of general application will survive Federal preemption, and thus the majority's proffered distinction between laws of general application and laws of specific application fails to provide a reliable guide for resolving preemption questions. If this distinction is useful at all, it is only because a law's general application supplies a necessary, though not a sufficient, predicate for a finding of no preemption.

Federal preemption of State laws may occur in three ways. First, State law may be expressly preempted, by an explicit Congressional statement to that effect. (*Shaw v. Delta Air Lines, Inc.* (1983), 463 U.S. 85, 95, 77 L. Ed. 2d 490, 500, 103 S. Ct. 2890, 2899). Second, State law may be implicitly preempted, as when Congress has occupied a field so extensively that any State regulation would be inconsistent with the comprehensive Federal scheme. (*Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.) Third, State law will be preempted when it actually conflicts with Federal law. A conflict will be found when compliance with both Federal and State provisions is impossible (*Florida Lime & Avocado Growers, Inc. v. Paul* (1963), 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 257, 83 S. Ct. 1210, 1217), or when the State law stands as an obstacle to the full accomplishment of the Federal purpose (*Hines v. Davidowitz* (1941), 312 U.S. 52, 67, 85 L. Ed. 581, 587, 61 S. Ct. 399, 404). Determining whether State law is preempted by Federal law is solely a question of Congressional intent. (*California Federal Savings & Loan Association v. Guerra* (1987), 479 U.S. 272, 280, 93 L. Ed. 2d 613, 623, 107 S. Ct. 683, 689.) In this regard, we may consider the presumption against

preemption in areas of law traditionally regulated by the States. (*Metropolitan Life Insurance Co. v. Massachusetts* (1985), 471 U.S. 724, 740, 85 L. Ed. 2d 728, 740-41, 105 S. Ct. 2380, 2389; *Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078; *West v. Northwest Airlines, Inc.* (9th Cir. 1990), 923 F.2d 657, 659.) "But when Congress has 'unmistakably . . . ordained' [citation] that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall." *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L. Ed. 24 604, 614, 97 S. Ct. 1305, 1309.

The Federal Aviation Act contains an express preemption provision, and the principal question before us is whether the challenged State laws and remedies at issue here fall within its scope. Section 1305(a)(1) of the Act provides, in pertinent part:

> "[N]o State or political subdivision thereof * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier * * *." (49 U.S.C. § 1305(a)(1) (1988).)

As construed by the courts, section 1305(a)(1) does not preempt every State-law-based claim affecting airlines and their operations. See *Air Transport Association of America v. Public Utilities Comm'n* (9th Cir. 1987), 833 F.2d 200, 207; see also *Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078 ("[D]espite the very broad and apparently all-inclusive language of [section 1305(a)(1)], common sense and common practice have forbidden that the statute be taken literally and have restricted its range").

The preemption provision was enacted as part of the Airline Deregulation Act of 1978 (Pub. L. 95-504, 92 Stat. 1708 (1978)) and later codified as section 1305 of

the Federal Aviation Act. In the Airline Deregulation Act, Congress significantly altered the dynamics of the airline industry by substantially reducing, though not completely eliminating, the Federal regulatory apparatus that had previously limited competition among air carriers. It seems clear, then, that a primary purpose of the preemption provision contained in the 1978 amendatory act was to prevent the States from attempting to re-regulate air carriers, by imposing their own potentially conflicting requirements, after Congress had deregulated the airline industry. (*New England Legal Foundation v. Massachusetts Port Authority* (1st Cir. 1989), 883 F.2d 157, 173; Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. Air L. & Com. 747, 755-56 (1979).) This is not to suggest that the range of State activity preempted by section 1305(a)(1) is necessarily coextensive with the regulatory apparatus dismantled in 1978. But Congress, having decided to exit the business of regulating air carriers' rates, routes, and services, surely wanted to forbid the States to attempt to fill that regulatory vacuum, and I would construe the preemption provision in that light.

If the principal objective of section 1305(a)(1) is to bar State economic regulation of air carriers (*Federal Express Corp. v. California Public Utilities Comm'n* (9th Cir. 1991), 936 F.2d 1075, 1078-79), then it must be concluded that the claims raised here fall outside the intended reach of that provision. The plaintiffs allege breach of contract and violations of the Consumer Fraud and Deceptive Business Practices Act (Ill. Rev. Stat. 1989, ch. 121½, pars. 261 through 272). By their complaints, the plaintiffs seek to enforce certain State-law-based statutory and common law rights. These claims are not regulatory in force or effect. They do not establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide. The plaintiffs' claims do not threaten the defendant airline with economic regulation, which Congress intended

to prevent the States from imposing on a deregulated airline industry. The plaintiffs seek only to enforce their statutory and common law remedies for the defendant airline's alleged breach of its self-imposed obligations. For these reasons, I would conclude that the plaintiffs' damage claims are not expressly preempted by section 1305(a)(1) of the Federal Aviation Act.

One further consideration that counsels against an overly expansive reading of the preemption provision is found in the savings clause of section 1506 of the Federal Aviation Act. Section 1506 provides:

> "Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (49 U.S.C. § 1506 (1988).)

The savings clause was part of the Federal Aviation Act prior to 1978, and the clause was retained by Congress notwithstanding the adoption of the preemption provision contained in the Airline Deregulation Act. As the majority opinion correctly concludes, the savings clause preserves, against implied preemption, State-law claims that are not specifically preempted by section 1305(a)(1). (*Trans World Airlines, Inc. v. Mattox* (5th Cir. 1990), 897 F.2d 773, 783, *appeal after remand* (1991), 924 F.2d 1055, *cert. granted* (1991), —— U.S. ——, 116 L. Ed. 2d 601, 112 S. Ct. 632; *Illinois Corporate Travel, Inc. v. American Airlines, Inc.* (7th Cir. 1989), 889 F.2d 751, 754.) By retaining the savings clause at the same time it added the preemption provision, Congress apparently believed that some statutory and common law remedies (see, *e.g.*, *Nader v. Allegheny Airlines, Inc.* (1976), 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978); *Braunswasser v. Trans World Airlines, Inc.* (W.D. Pa. 1982), 541 F. Supp. 1338) would in fact survive the enactment of section 1305(a)(1).

As a final matter, I question the majority's conclusion that the plaintiffs' requests for injunctive relief are preempted even though their claims for money damages are not. The majority applies the same distinction adopted by the appellate court in the present case (207 Ill. App. 3d 35, 39). It is not clear, however, that the two forms of relief are so readily distinguishable for preemption purposes. *See International Paper Co. v. Ouellette* (1987), 479 U.S. 481, 498 n.19, 93 L. Ed. 2d 883, 901 n.19, 107 S. Ct. 805, 815 n.19.) In any event, in the absence of a finding that the plaintiffs properly allege claims for which injunctive relief may be awarded, I believe it is premature to attempt to determine in this interlocutory appeal whether that form of relief would be preempted by Federal law. The question whether the plaintiffs may obtain injunctive relief under the Consumer Fraud and Deceptive Business Practices Act has not been raised in this court and thus is not before us. If, as the appellate court concluded, private actions for injunctive relief are not available under the Act (207 Ill. App. 3d at 39), we would have no occasion to consider in this case the preemptive effect of section 1305(a)(1) on that portion of the plaintiffs' action.

For the reasons stated, I concur in the court's judgment.

APPENDIX E

ILLINOIS APPELLATE COURT
THIRD DIVISION

December 12, 1990

No. 1-89-0918

MYRON (MIKE) WOLENS, ALBERT J. GALE,
R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON,
individually and on behalf of others similarly situated,
Plaintiffs-Appellees,
v.

AMERICAN AIRLINES, a foreign corporation,
Defendant-Appellant.

P.S. TUCKER, on behalf of herself and
all others similarly situated,
Plaintiff-Appellee,
v.

AMERICAN AIRLINES, a foreign corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
Honorable Arthur L. Dunne, Judge Presiding

JUSTICE WHITE delivered the opinion of the court.

Defendant American Airlines has filed this interlocutory appeal from an order of the circuit court denying

defendant's motion to dismiss plaintiffs' complaints. Defendant contends that plaintiffs' claims are preempted by federal law and barred by the Commerce Clause.

In 1988, plaintiffs Myron Wolens, Albert Gale, R. Craig Zafis, Bret Maxwell, and Robert Nelson filed a class action complaint against defendant in the circuit court of Cook County. The complaint alleged that in 1981 or 1982, defendant created the American Airlines AAdvantage frequent flyer program and solicited public membership in the program through advertisement in the national media and general mailings. Plaintiffs alleged that this solicitation constituted a unilateral contract offer which they accepted when they joined the program sometime prior to 1988.

Plaintiffs alleged that after joining the program and receiving materials from defendant detailing the available benefits and the mileage credits required therefor, they accumulated mileage credits by using the airlines and facilities of defendant and of those participating with defendant, even if other less costly or more convenient services were available. Plaintiffs further alleged that the value of their credits was substantially and adversely affected when, on May 18, 1988, defendant unilaterally instituted a retroactive reduction in the benefits available in exchange for the credits.

Plaintiffs charged that defendant's action in unilaterally and retroactively reducing program benefits constituted a breach of defendant's contracts with plaintiffs and all others who joined the program prior to May 1988. Plaintiffs also charged that defendant's action was in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"). (Ill. Rev. Stat. 1988, ch. 121½, pars. 261 *et seq.*) Plaintiffs sought monetary damages and an injunction preventing retroactive application of any changes in the program to mileage credits earned prior to such changes.

Defendant removed the action to the United States District Court for the Northern District of Illinois on the ground that the complaint raised a federal question exclusively committed to adjudication in the federal courts by section 105(a)(1) of the Federal Aviation Act. (49 U.S.C. § 1305(a)(1).) The district court remanded the action to the circuit court finding that plaintiffs' complaint was grounded in state law and that nothing in section 1305 or its legislative history indicated a congressional intent to convert plaintiffs' state contract and fraud claims into federal actions removable to federal court. *Wolens v. American Airlines, Inc.*, No. 88-C-8158 (N.D. Ill., Oct. 25, 1988).

Subsequent to the district court's order remanding the action to the circuit court, a second class action complaint was filed against defendant by P. S. Tucker. The second complaint, like the first, alleged that defendant's action in retroactively modifying the rules of the frequent flyer program constituted a breach of contract and violated the Consumer Fraud Act.

The two actions were consolidated and defendant moved to dismiss both contending that the causes of actions were expressly preempted by section 1305(a). Defendant also argued that plaintiffs' actions were barred by the Commerce Clause because subjecting airlines to state consumer fraud and common law contract claims would impose a burden on interstate commerce.

On March 20, 1989, the circuit court entered a memorandum opinion and order denying defendant's motion to dismiss. The court found that section 1305 did not preempt plaintiffs' claims and that nothing in the record indicated that prosecution of plaintiffs' claims would burden interstate commerce.

On March 23, the court granted defendant's motion for certification of a question for interlocutory appeal. The question certified for appeal was: "Whether plaintiffs' claims are preempted by the Federal Aviation Act

of 1958, as amended, 49 U.S.C. §§ 1301-1557, and by the federal regulations promulgated thereunder, and precluded under the Commerce Clause of the United States Constitution?" We conclude that this question must be answered in the negative.

OPINION

The United States Supreme Court acknowledged in *Wardair Canada v. Florida Department of Revenue* (1986), 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed. 2d 1, that Congress had regulated aviation extensively. However, the Court also pointed out that State law is not preempted whenever there is any federal regulation of an activity or industry. 477 U.S. at 6.

There are three instances where federal law will be found to preempt State law: (1) where Congress has expressly preempted state law; (2) where congressional intent to preempt may be inferred from the pervasiveness of the federal regulatory scheme; and (3) when state law conflicts with federal law or interferes with the achievement of congressional objectives. (*West v. Northwest Airlines, Inc.*, No. 89-35820 (9th Cir. September 11, 1990; *O'Carroll v. American Airlines, Inc.* (5th Cir. 1989), 863 F.2d 11.) In the case before us, defendant contends that plaintiffs' claims are expressly preempted by section 1305. Defendant also contends that section 1305 and its legislative history demonstrate a Congressional intent to occupy the entire field and exercise exclusive federal control over aviation matters. Finally, defendant argues that the Commerce Clause bars plaintiffs' claims.

I. Express Preemption

Section 1305(a) provides that:

> "[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier * * *."

Defendant argues that all of plaintiffs' claims are directly related to defendant's rates or services and, therefore, are preempted.

Plaintiffs' breach of contract and Consumer Fraud Act claims seek to recover damages for the loss in value of their mileage credits. Plaintiffs also request orders enjoining defendant from applying any subsequent changes in the frequent flyer program to plaintiffs.

Initially we note that private actions for injunctive relief may not be maintained under the Consumer Fraud Act. *Martin v. Eggert* (1988), 174 Ill. App. 3d 71, 528 N.E.2d 386.) In addition, we find that any attempt to enjoin defendant's application of its new program rules would be an attempt to regulate the services of an airline and thus a violation of section 1305. See *Hingson v. Pacific Southwest Airlines* (9th Cir. 1984), 743 F.2d 1408; *Anderson v. USAir, Inc.* (D.D.C. 1985), 619 F.Supp. 1191, aff'd 818 F.Supp. 49.

However, we also find that plaintiffs' claims for damages for breach of contract and violation of the Consumer Fraud Act are not preempted by section 1305. See *Beineman v. Chicago* (7th Cir. 1988), 864 F.2d 463; *Hingson v. Pacific Southwest Airlines; In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975* (2nd Cir. 1980), 635 F.2d 67; *Wolst v. American Airlines, Inc.* (N.D.Ill. 1987), 668 F.Supp. 1117; *Anderson v. USAir, Inc.; Brunwasser v. Trans World Airlines, Inc.* (W.D.Pa. 1982), 541 F.Supp. 1338.

In *Anderson* and *Hingson*, blind plaintiffs brought suit alleging that the defendant airlines' policy of excluding blind persons from occupying certain seats on aircraft violated local laws providing equal access for and precluding discrimination against the handicapped. The court of appeals in *Hingson* and the federal district court

in *Anderson* both held that the state laws in question were preempted by section 1305. The courts stated that the term "services" as used in section 1305 included the regulation of air carrier seating policies for handicapped persons. *Hingson*, 743 F.2d at 1415-16; *Anderson*, 619 F.Supp. at 1198.

However, the courts in *Hingson* and *Anderson* also found that the blind plaintiffs' common law claims for damages for intentional infliction of emotional distress were not preempted by section 1305. (*Hingson*, 743 F.2d at 1416; *Anderson*, 619 F.Supp. at 1197.) Several other courts have also concluded that common law actions for damages are not preempted by section 1305. See *West v. Northwest Airlines, Inc.*; *Bieneman v. Chicago*, 864 F.2d at 471; *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*, 635 F.2d at 74; *Holliday v. Bell Helicopters Textron, Inc.*, No. 88-00904 (D.Hawaii, Oct. 12, 1990); *New York v. Trans World Airlines, Inc.* (S.D.N.Y. 1989), 728 F.Supp. 162; *Illinois Corporate Travel, Inc. v. American Airlines, Inc.* (ND.Ill. 1988), 682 F.Supp. 378, 380 n.1, aff'd 889 F.2d 752; *Wolst v. American Airlines, Inc.* (N.D.Ill. 1987), 668 F.Supp. at 1119; *Brunwasser v. Trans World Airlines, Inc.* (W.D.Penn. 1982), 541 F.Supp. at 1345; *Stream Aviation, Inc. v. Anders Production, Inc.* (La. 1987), 517 So.2d 1157; *People v. Western Airlines, Inc.* (1984), 155 Cal.App.3d 597.

We are aware that some courts have reached an opposite conclusion. (*See Mattox v. Trans World Airlines, Inc.* (5th Cir. 1990), 897 F.2d 773; and *O'Carroll v. American Airlines, Inc.*, both holding that common law claims against an airline were preempted by section 1305.) However, we believe that the better reasoned view is that expressed in *West v. Northwest Airlines, Inc.* There, the ninth circuit court of appeals stated:

> *"We disagree with Northwest and the district court that 'law[s] . . . relating to airline services' encompasses all state laws that affect airline services, however tangentially.* This interpretation of § 1305 (a)(1) would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area. Instead, we find that Section 1305(a)(1) preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving air services. Thus, *state laws that merely have an effect on airline services are not preempted* (emphasis added)."

The claims for damages in the present case arise out of plaintiffs' contracts with defendant. The claims bear only a tangential relation to defendant's rates and services and any effect that an award of damages would hve on defendant's rates and services would be remote and indirect. (*New York v. Trans World Airlines, Inc.*, 728 F.Supp. at 176; and see *Nader v. Allegheny Airlines* (1976), 426 U.S. 290, 300, 96 S.Ct. 1978, 48 L.Ed.2d 643 (holding that any impact on rates that may result from the imposition of common law tort liability or from practices adopted by a carrier to avoid such liability would be incidental); and *Beineman v. Chicago*, 864 F.2d at 471 (pointing out that State courts award damages every day in air crash cases notwithstanding the fact the federal law preempts State regulation of safety in air travel).) Accordingly, we conclude that section 1305 does not expressly preempt plaintiffs' actions for damages for breach of contract and violation of the Consumer Fraud Act.

II. Implied Preemption

Defendant argues that the extensive regulation of the field of aviation by Congress and the Department of Transportation demonstrate congressional intent to occupy the entire field. Defendant bases its argument on sections 102(a)(7) and 411 of the Federal Aviation Act (49 U.S.C. §§ 1302(a)(7), 1381) and the provisions of

the Civil Aeronautics Board Sunset Act of 1984 ("Sunset Act") (P.L. No. 98-443, 98 Stat. 1703). Defendant argues that these authorities establish that Congress intended that the Department of Transportation have exclusive authority for regulating advertising and preventing deceptive practices by airlines. We disagree.

Section 1302(a)(7) states only that the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation shall be considered in the public interest and in accordance with the public convenience. Nothing in its language gives rise to an inference that section 1302(a)(7) was intended to foreclose State damage actions against an airline for engaging in deceptive practices. See *New York v. Trans World Airlines*, 728 F.Supp. at 177.

Turning to defendant's argument that section 1381 indicates a congressional intent to preclude State consumer protection claims, we note that a similar argument was rejected by the Supreme Court in *Nader v. Allegheny Airlines*. There, the Court held that section 1381 did not eliminate state court common law or statutory claims against airlines for fraud; rather, the Court ruled that such claims were preserved by section 1106 of the Federal Aviation Act (49 U.S.C. § 1506). *Nader*, 426 U.S. at 300.

Section 1506 provides that:

> "Nothing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The Supreme Court found that section 1381 was intended, not to preclude, but to supplement the compensatory common law remedies for private parties preserved under section 1506. *Nader*, 426 U.S. at 300-1.

Defendant contends that the *Nader* decision cannot be considered as controlling because the decision predated the Sunset Act of 1984. Defendant argues that a statement in the legislative history of the Sunset Act, that the Act preempts State regulation of consumer protection and unfair competitive practices, indicates that Congress intended to preempt plaintiffs' claims.[1]

As our earlier discussion points out, an award of damages for breach of contract or violation of the Consumer Fraud Act does not amount to "State regulation." Further, Congress in passing the Sunset Act in 1984, is presumed to have been aware of the Supreme Court's 1976 holding in *Nader* that section 1506 preserved State common law claims for fraud. Thus, Congress's retention of section 1506 following passage of the Sunset Act, indicates its tacit approval of the Supreme Court's decision. Accordingly, we find that Congress did not intend the Sunset Act to preempt plaintiffs' state law damage claims.

III. Commerce Clause

Defendant argues that the circuit court erred in holding that the Commerce Clause did not bar plaintiffs' claims. Defendant contends that by seeking an injunction in an Illinois court that will require defendant to provide specific services to its frequent flyer program members nationwide, plaintiffs are attempting to regulate interstate commerce.

In our discussion above, we pointed out that plaintiffs could not maintain a private action for injunctive relief under the Consumer Fraud Act and that any attempt to

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[1] The statements defendant relies on are contained in House Report 793 (H.R. 793, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2858.) The House Report provides that:

> "In addition, to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines."

enjoin defendant's action would constitute improper State regulation of the activities of an airline. In light of the foregoing, defendant's arguments that an injunction would violate the Commerce Clause are moot.

In conclusion, we find that although plaintiffs' claims for injunctive relief are expressly preempted by section 1305, plaintiffs' common law and statutory damage claims are neither expressly or implicitly preempted. Accordingly, the order of the circuit court denying defendant's motion to dismiss is affirmed.

AFFIRMED.

RIZZI and FREEMAN,* JJ., concurring.

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* JUSTICE FREEMAN concurred in this opinion prior to his election to the Illinois Supreme Court.

APPENDIX F

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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88 CH 7554

consolidated with: 89 CH 119

JUDGE ARTHUR L. DUNNE, Presiding

MYRON (MIKE) WOLENS, *et al.*,
Plaintiff,

v.

AMERICAN AIRLINES, INC.,
Defendant.

P.S. TUCKER,
Plaintiff,

v.

AMERICAN AIRLINES,
Defendant.

MEMORANDUM OPINION AND ORDER

[Entered Mar. 20, 1989]

The complaints in these consolidated cases in sum allege that changes in American Airline's ("AA") frequent flyer program, "AAdvantage", constitute a breach of contract. The plaintiffs seek damages and injunctive relief on behalf of themselves individually and on behalf of others similarly situated pursuant to the Illinois Con-

sumer Fraud and Deceptive Business Practice Act, Ill. REV.STAT. ch. 121½, para. 261-272 (1987).

In both cases AA has filed identical motions to dismiss. Consequently, this opinion and order applies to both cases. AA's motions to dismiss contend in summary that these complaints are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301-1557, its accompanying federal regulations and by the Commerce Clause of the United States Constitution. Specifically, AA contends that 49 U.S.C. sec. 1305(a) expressly preempts any statutory or common law cause of action which would afford plaintiff relief and that Congress intended to remove the states from any regulation of airlines. In addition, the defendant argues that the Commerce Clause bars this action because to subject airlines to the state consumer fraud and contract law would impose a burden which materially affects interstate commerce in an area previously regulated by federal law. United States Constitution, Article I, section 8, cl. 3.

In response, the plaintiffs argue that 49 U.S.C. sec. 1506 allows these state causes of action and that the AA's reading of sec. 1305 is unduly expansive, i.e., this action is not a regulation of "rates, routes or services." Moreover, Congress did not intend to preempt all state remedies. The Commerce Clause does not bar prosecution of these actions.

I.

These motions raise a question of statutory interpretation. What is the affect of the apparent conflict between 49 U.S.C. sec. 1305(a) and sec. 1506? Sec. 1506, enacted August 23, 1958, reads as follows: "Nothing in this chapter (same chapter as section 1305) shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." As far as this court can determine, sec. 1506 has not been explicitly repealed

by any subsequent act of Congress. However, in 1978, Congress enacted the Airline Deregulation Act, Pub. L. No. 95-505, 92 Stat. 1705. As part thereof, Congress enacted 49 U.S.C. sec. 1305(a)(1) which reads in part: ". . . no state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or service of any air carrier. . . "

Sec. 1506 makes the general statement that the remedies of the Federal Aviation Act are not exclusive. Sec. 1305 apparently contradicts that by preempting state regulation. However, on closer reading, sec. 1305 preempts only those state enactments or the enforcement of state laws which "relate to rates, routes and other services." Sec. 1506 is a general rule. Sec. 1305 is a specific exception to the general rule. Reading sec. 1506 and section 1305 together it appears that state remedies are available except to the extent that those laws relate to rates, routes, or services. The issue is whether the plaintiff's enforcement of the Illinois consumer fraud claim and common law contract claim relate to rates or services.

This court can find no reported case, state or federal, which has decided this issue. However, AA cites *Rivkin v. Northwest Airlines*, No. 88 CH 2637 (Circuit Court of Cook County, Dec. 8, 1988, as amended Dec. 15, 1988). As of this date, a motion to reconsider the interlocutory *Rivkin* decision pends. There is no collateral estoppel effect by *Rivkin*. *Colbe v. Chicago Health Club, Inc.* 53 Ill.App.3d 1019 (1st Dist. 1977). The analysis of *Rivkin* is persuasive at best. However, this court is unpersuaded. In *Rivkin*, Judge Hall determined that the Northwest frequent flyer program related to rates because an affidavit of Northwest Airlines stated that the cost of the frequent flyer program was factored into the determination of rates. There is no such affidavit in the instant case. Even assuming arguendo the existence of such affidavit, this Court rejects the *Rivkin* reasoning. Such

an interpretation would have the exception swallow the rule. This court will not apply such a broad reading of "relating to rates, routes or services." Assuming AA passed on the cost of the frequent flyer program, it would be ludicrous to propose that anything which might contribute to a determination of fare becomes the subject of preemption. Surely airlines take into account the cost of tort claims when fixing rates, yet no one would dispute the state court's jurisdiction to hear tort cases filed against an airline. *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988). To preempt enforcement of the consumer fraud act or a common law contract would afford AA an "impenetrable immunity" from enforcement of its contracts. See *Owen v. City of Atlanta*, 157 Ga. App. 354, 277 S.E.2d 338 (1981), *aff'd* 248 Ga. 299, 282 S.E.2d 906, *cert. denied*, 456 U.S. 972, 72 L. Ed.2d 846, 102 S.Ct. 2285 (1982).

II.

AA argues that Congress transferred consumer related responsibilities from the Civil Aeronautics Board to the Department of Transportation ("DOT") citing 49 U.S.C. sec. 1302(a)(7), sec. 1381(a) and that DOT has exclusive power over consumer matters. This court finds no statutory authority for that argument. Sec. 1302(a)(7) says that the Board shall consider the prevention of unfair, deceptive, predatory or anticompetitive practices in air transportation. This is hardly the type of regulation that would give rise to implicit preemption. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Sec. 1506 specifically states that the remedies in (this act) are not exclusive. The Illinois Consumer Fraud Act is a remedy that is not excluded under Sec. 1506.

III.

Finally, AA argues that prosecution of the plaintiffs' consumer fraud and contract actions constitute state regulations which materially affect interstate commerce

in a regulated area in violation of the Commerce Clause. AA's attempt to remove this case to the federal court was unsuccessful. *Wolens v. American Airlines*, No. 88 C 8158 (N.D. Ill. Oct. 24, 1988) Judge Nordberg Presiding. This court finds no evidence in the record of any effect on interstate commerce. AA has submitted no affidavit in support of that proposition. In light of *Pike v. Brace Church, Inc.*, 397 U.S. 137 (1970) and the lack of evidence of a burden on interstate commerce the court finds that prosecution of these actions is not precluded by the Commerce Clause of the United States.

CONCLUSION AND ORDER

The defendant's motions to dismiss are denied for the above stated reasons.

IT IS HEREBY ORDERED that the defendant shall have 10 days to answer or otherwise plead to the consolidated complaints. Following this court's hearing in the pending 2-615 [*illegible*] motion.

/s/ Arthur L. Dunne
JUDGE ARTHUR L. DUNNE

DATE: March 20, 1989

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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88 CH 7554

consolidated with: 89 CH 119

JUDGE ARTHUR L. DUNNE, Presiding

MYRON (MIKE) WOLENS, *et al.*,
Plaintiff,
v.

AMERICAN AIRLINES, INC.,
Defendant.

P.S. TUCKER,
Plaintiff,
v.

AMERICAN AIRLINES,
Defendant.

ORDER

[Entered Mar. 21, 1989]

THIS CAUSE COMING ON TO BE HEARD on Defendant's Motion to Dismiss the Complaints, as consolidated, pursuant to Sec. 2-619 of the Illinois Code of Civil Procedure, the Court having heard arguments of counsel and having examined Memoranda of Law and otherwise being fully advised in the premises;

IT IS HEREBY ORDERED

1. Defendant's Motions to Dismiss pursuant to Sec. 2-619 of the Illinois Code of Civil Procedure are

denied for the reasons set forth in the Court's Memorandum Opinion and Order.

2. Plaintiffs shall have leave to file a brief in opposition to Defendant's 2-615 Motion to Strike, limited to 12 pages, within 14 days hereof.
3. Defendant shall have leave to file a Reply brief, limited to 12 pages, within 14 days thereafter.
4. Hearing on Defendant's 2-615 Motion to Strike is set for May 2, 1989, at 11:00 a.m., without further notice.
5. Defendant shall file an answer to the Complaint within 10 days thereafter, on or before May 12, 1989.

Atty No. 90513

Name Gilbert W. Gordon

MARKS, MARKS AND KAPLAN, LTD.
Attorney for Plaintiffs

Address 30 N. LaSalle St., #3040

City Chicago, IL 60602

Telephone (312) 332-5200

ENTER:

/s/ Arthur L. Dunne
Judge

APPENDIX G

IN THE CIRCUIT COURT
OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 88CH7554

MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

AMERICAN AIRLINES, INC., a foreign corporation,
Defendant.

JURY DEMANDED ON ALL ISSUES AT LAW

CLASS ACTION COMPLAINT
FOR INJUNCTIVE AND OTHER RELIEF

NOW COME the Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of a class of persons similarly situated, and complaining of the Defendant, AMERICAN AIRLINES, INC., a foreign corporation ("AMERICAN"), state as follows:

COUNT I
(IN CHANCERY)

THE CLASS ACTION

1. Defendant operates a domestic and international airline which is authorized to do and does business in the County of Cook and State of Illinois. As a marketing

device for the purpose of encouraging greater use of its airline facilities by the general public, and more particularly, by frequent airline travelers, it created in 1981 or 1982 a program known as the American AAdvantage Program ("PROGRAM"). Other companies such as other airlines, hotels, and car rental companies also participated with Defendant in the Program. AMERICAN, in consideration for use of its airline and/or the services or facilities of other participants with Defendant in the Program, awarded mileage credits which the traveler was both permitted and induced to accumulate and exchange for a variety of travel and other benefits, the greater the number of mileage credits earned and accumulated, the greater the available benefits for which they could be exchanged.

2. Defendant solicited use of its airline by the general public and, more particularly, by frequent travelers, by featuring its Program in diverse national media and by general mailings and distribution of promotional materials which included applications for membership in the Program, a list of benefits and facilities available, and a delineation of the mileage credits required to obtain the specifically listed benefits. To persons who joined the Program, Defendant sent further explanatory materials detailing the available benefits and the mileage credits required therefor. The greater the number of mileage credits a member accumulated, the greater the benefits he was entitled to receive.

3. Prior to May 18, 1988, each of the named Plaintiffs accepted Defendant's offer, joined the Program, used Defendant's airline, even if more costly or less convenient than others, and/or used the services and facilities of others participating with Defendant in the Program, and received and accumulated mileage credits for the miles so traveled and services and facilities so used.

4. The class which the named Plaintiffs represent consists of persons of the United States who, like the named

Plaintiffs, also joined the Program prior to May 18, 1988, traveled upon Defendant's airline and/or used the services and facilities of other participants in the Program and, as of May 18, 1988, accumulated mileage credits which they still retain. The value of those credits was substantially and adversely affected by Defendant who, effective May 18, 1988, retroactively reduced the benefits theretofore available for said credits, by instituting capacity control restrictions which significantly limit the number of seats available for passengers that wish to pay for travel with Program travel awards.

5. The class of persons affected by the foregoing is so numerous, consisting of millions of persons, that joinder of all members of said class is impracticable.

6. There are questions of both fact and law common to the class, which common questions predominate over any questions affecting only individual members of the class, to wit: each and every class member as did each named Plaintiff, prior to May 18, 1988, by accepting Defendant's aforesaid offer, becoming members of the Program and traveling upon the Defendant airline and/or using the services of other participants in the Program for which they were entitled to mileage credits, accumulated substantial mileage credits which they still retain but the value of which credits, just as was the value of the mileage credits held by the named Plaintiffs, was substantial and adversely affected by Defendant's aforedescribed conduct. Whether such conduct of the Defendant was a breach of contract and/or a violation of the Illinois Consumer Fraud and Deceptive Business Practice Act (Ill. Anno. Stats. Ch. 121½ Section 261, *et seq.*) is common to the rights of all members of the class.

7. The named Plaintiffs and their attorneys will fairly and adequately protect the interests of the class in that the named Plaintiffs like all other members of the class had substantial mileage credits in the Program accumulated prior to May 18, ~~1988,~~ which were adversely affected by Defendant's aforesaid action in a like manner, though not necessarily to the same extent, as all other members of the class.

8. A class action is the most fair, just and efficient manner in which to adjudicate the claims arising out of the aforesaid conduct of the Defendant. Should individual actions be brought, or be required to be brought by each individual Plaintiff, a multiplicity of lawsuits would result and cause undue hardship and expense for the Court and the litigants.

9. The prosecution of separate actions by individual members of the Plaintiff class would also create a risk of inconsistent or varying adjudications and rulings with respect to individual members of the class. Additionally, the prosecution of separate actions against the Defendant would create a risk of rulings which might be dispositive of the interests of other class members not parties to the adjudications or substantially impede their ability to protect their interests.

STATEMENT OF CLAIM

10. Defendant's aforesaid solicitation constituted a unilateral offer by Defendant to each named Plaintiff and class member which each said Plaintiff and class member prior to May 18, 1988, accepted by joining the Program, traveling on the Defendant's airline and/or using the facilities and services of other participants in the Program, and thereby, earned mileage credits under the Program which the Defendant, by increasing the available benefits as the accumulated mileage increased, induced them to retain, increase and accumulate.

11. As such mileage credits were earned and accumulated by each named Plaintiff and class member, each said Plaintiff and class member accrued a contractual right to receive from Defendant and Defendant became contractually obligated to furnish to each such Plaintiff and class

member, the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned, accrued and accumulated. Defendant could not alter program benefits retroactively as to mileage credits which had theretofore been earned and accumulated under the Program.

12. As heretofore detailed, each of the named Plaintiffs and the class they represent were members of the Program who, prior to May 18, 1988, did, in the manner aforedescribed, earn and accumulate substantial mileage credits which they still retain.

13. Prior to May 18, 1988, each named Plaintiff and the members of the class were entitled to redeem their American AAdvantage award certificates for free air travel on any available date to applicable destinations for any available seat in the class of service provided (i.e., first class, coach or economy class).

14. Effective May 18, 1988, Defendant unilaterally altered the benefits available to participants in the Program by instituting capacity control restrictions wherein the Defendant restricted or otherwise limited the opportunity of Program members to redeem their award levels for travel or other benefits offered in the Program and/or limited the opportunity of Program members to earn mileage sufficient for specific award levels. Defendant's implementation of capacity control restrictions included both blackout dates, during which no free flights were available, and the limitation of the maximum number of seats allocated to persons wishing to pay for flights with free travel awards.

15. Defendant's unilateral reduction of the value of benefits for mileage credits earned prior to May 18, 1988, and which each traveler was induced by Defendant as aforedescribed to increase, retain and accumulate, was in breach of the contract between the Defendant, on the one hand, and, on the other hand, the named Plaintiffs

and the class members who accepted Defendant's offer by traveling upon Defendant's airline, even if it were more costly and less convenient than other airlines, and/or by using the services of others who participated with Defendant in the Program, and thereby earning and accumulating mileage credits under the Program prior to May 18, 1988, for which they were entitled to the benefits available for such mileage credits prior to May 18, 1988.

16. Unless this Court assumes equitable jurisdiction and otherwise so orders, the Defendant will not only impose capacity control restrictions as to the benefits offered under the Program applicable retroactively to mileage credits earned, accumulated and accrued by each of the named Plaintiffs and members of the class prior to May 18, 1988, but will continue to adopt additional changes which it will similarly retroactively apply and thereby require additional litigation.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

A. To certify this claim as a class action in order that the named Plaintiffs and their attorneys may represent the class of persons similiarly situated;

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, which they still retain was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit;

C. A preliminary and permanent injunction enjoining the Defendant from applying any subsequent changes in the Program Defendant may hereafter make which reduce the benefits available under the Program, to the mileage credits earned, accumulated and accrued prior to any such subsequent changes made by the Defendant;

D. For an award of costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause; and

E. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiffs and the class they represent.

COUNT II

(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 thorugh 9, inclusive, of Count I are hereby re-alleged as Paragraphs 1 through 9, inclusive, of this Count II hereof as though set out in full in said Count II.

STATEMENT OF CLAIM

10-15. Paragraphs 10 through 15, inclusive, of Count I are hereby re-alleged as Paragraphs 10 through 15, inclusive, of this Count II hereof as though set out in full in said Count II.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray the Honorable Court:

A. To determine the class and thereupon certify this claim as a class action in order that the

named Plaintiffs and their attorneys may represent the class of persons similarly situated.

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, which they still retain was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit.

C. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.

D. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiffs and the class they represent.

COUNT III

(IN CHANCERY)

CLASS ACTION

1-9. Paragraphs 1 through 9 inclusive of this Complaint entitled "Class Action" are hereby re-alleged as Paragraphs 1 through 9 inclusive of this Count II hereof as though set out in full in said Count II.

STATEMENT OF CLAIM

10. The named Plaintiffs and each class member prior to May 18, 1988, were led to believe by Defendant's aforesaid solicitations that each, by joining the Program, using the Defendant airline and/or the services and facilities of other participants in the Program, would earn mileage credits which, if accumulated, would entitle each to receive in exchange therefor certificates for free air

travel to applicable destinations for any available date for any available seat in the class of service provided. Defendant, by making greater benefits available for the accumulation of greater mileage credits, induced the said named Plaintiffs and members of the class to increase, hold and accumulate their mileage credits.

11. Accordingly, and in reliance upon the said solicitations, each named Plaintiff and class member, prior to May 18, 1988, joined the Program, traveled on the Defendant's airline and/or used the facilities and services of other participants in the Program and thereby earned mileage credits under the Program, which they accumulated so as to obtain the greater benefits offered therefor. The named Plaintiffs and some class members still retain all of their credits so earned and accumulated.

12-13. Paragraphs 13 and 14 of Count I of this Complaint are hereby re-alleged as Paragraphs 12 and 13 of this Count III hereof as though set out in full in said Count III.

14. During the year 1988, in particular, the Defendant induced each named Plaintiff and class members to fly even more frequently on the Defendant airline by offering "Triple Mileage" for each actual mile flown. Defendant offered "Triple Mileage" even though they knew that they would institute capacity control restrictions which would limit the number of seats available and therefore dilute the value of the mileage credits accumulated.

15. At no time either in its aforesaid solicitations or otherwise, while inducing the named Plaintiffs and the members of the class to earn and, more particularly, to accumulate mileage credits and while said mileage credits were, in fact, being earned and accumulated, did Defendant ever advise the said Plaintiffs and members of the class that Defendant believed that it reserved the right and would whenever it determined that it was in its benefit so to do, retroactively restrict, suspend or otherwise alter or reduce the benefits available under the

Program for mileage credits thertofore earned, accumulated and accrued thereunder, by the implementation of capacity control restrictions or otherwise.

16. As a direct and proximate result of Defendant's aforesaid acts, the mileage credits earned, accumulated and still retained by each named Plaintiff and member of the class prior to May 18, 1988, were substantially reduced in value as were those of member of the class who earned mileage credits prior to May 18, 1988.

17. At all times material to this Complaint, there was in full force and effect, as Sections 261, *et seq*. of Chapter 12½ of the Illinois Annotated Statutes, an Act entitled: "The Consumer Fraud and Deceptive Business Practice Act."

18. The aforesaid wrongful acts and omissions of the Defendant constituted violations of the said Act by which each named Plaintiff and other member of the class suffered damages as aforedescribed.

19. Section 10 of the Act authorizes any person who suffers damages as a result of a violation of the Act to bring an action against any other person who committed the act for such relief as the Court deems fit, including reasonable attorney's fees and costs.

20. Each named Plaintiff, member of the class and the Defendant is a "person" as defined by said Act.

21. Paragraph 16 of Count I of this Complaint is realleged as Paragraph 20 [sic] of this Count III hereof as though set out in full in said Count III.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

A. To determine the class and thereupon certify this claim as a class action in order that the named

Plaintiffs and their attorneys may represent the class of persons similarly situated.

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit.

C. A preliminary and permanent injunction enjoining the Defendant from applying any subsequent changes in the Program Defendant may hereafter make which reduce the benefits available under the Program, to the mileage credits earned, accumulated and accrued prior to any such subsequent changes made by the Defendant, including any limitation of seats of imposition of blackout periods of time.

D. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.

E. For such other and further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiff and the class they represent.

COUNT IV

(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 1 through 9, inclusive, of this Count IV as though set out in full in said Count IV.

STATEMENT OF CLAIM

10-16. Paragraphs 10 through 16, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 10 through 16, inclusive, of this Count IV as though set out in full in said Count IV.

17-21. Paragraphs 17 through 21, inclusive, of Count III of this Complaint are re-alleged as Paragraphs 17 through 21, inclusive, of this Count IV as though set out in full said in Count IV.

WHEREFORE, Plaintiffs, MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of the class of persons similarly situated, respectively pray this Honorable Court:

A. To determine the class and thereupon certify this claim as a class action in order that the named Plaintiffs and their attorneys may represent the class of persons similarly situated.

B. For judgment against the Defendant for damages in the amount that the value of the mileage credits earned and accumulated by the named Plaintiffs and the members of the class prior to May 18, 1988, was reduced by reason of the acts of the Defendant aforedescribed, together with punitive damages in such sum as shall be deemed fit.

C. For an award against the Defendants for costs and reasonable attorney's fees incurred for and on behalf of the named Plaintiffs and members of the class in connection with the prosecution of this cause.

D. For such other further relief as this Court may deem fit to grant in fashioning a remedy for the named Plaintiff and the class they represent.

MYRON (MIKE) WOLENS, ALBERT J. GAYLE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of all others similarly situated,

By:/s/ [Illegible]
One of their Attorneys

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APPENDIX H

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION

No. 89 CH 119

P. S. TUCKER, on behalf of herself and all others similarly situated,
Plaintiff,

v.

AMERICAN AIRLINES, INC.,
a foreign corporation,
Defendant.

JURY TRIAL DEMANDED ON ALL ISSUES
AT LAW

CLASS ACTION

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Now comes the Plaintiff, P. S. Tucker, on behalf of herself and all others similarly situated, complaining against defendant American Airlines, Inc. ("American"), a foreign corporation, as follows:

COUNT I

(IN CHANCERY)

THE CLASS ACTION

1. Defendant operates a domestic and international airline which is authorized to do and does business in the

County of Cook and the State of Illinois. As a marketing device for the purpose of encouraging greater use of its airline facilities by the general public and, more particularly, by frequent airline travelers, defendant created more than 5 years ago a program entitled the "AAdvantage" frequent flyer program ("Program"). Other companies also participated with defendant in the Program, including other airlines, hotel and rental car companies.

2. In consideration for use of defendant's airline and/or the services or facilities of other participants with defendant in the Program, defendant awarded mileage credits which the traveler was both permitted and induced to accumulate and exchange for a variety of travel and other benefits. The greater the number of mileage credits earned and accumulated, the greater the available benefits for which they could be exchanged.

3. Defendant solicited use of its airline by the general public and, more particularly, by frequent travelers, by featuring its Program in diverse national media and by general mailings and distribution of promotional materials, including applications for membership in the Program, a list of benefits and facilities available, and a delineation of the mileage credits required to obtain the specifically listed benefits.

4. To induce persons to join the Program and to fly American and otherwise use the Program, defendant sent further explanatory materials detailing the available benefits and the mileage credits required therefor. The greater the number of mileage credits a member accumulated, the greater the benefits he or she was entitled to receive.

5. Prior to June 1, 1988, the named plaintiff accepted defendant's offer to join the Program; used defendant's airline, even if more costly or less convenient than others; used the services and facilities of others participating with defendant in the Program; and received and accumulated mileage credits for the miles traveled and services and facilities used. As a result, prior to June 1, 1988, plaintiff had accumulated and still retains mileage credits in the Program.

6. Plaintiff brings this action on behalf of herself and a class of persons who joined the Program prior to June 1, 1988, and who accumulated mileage credits as of such date, which they either still retain or plan to use in whole or part after June 1, 1988. The value of those credits was substantially and adversely affected by defendant who, effective June 1, 1988, announced numerous changes in the Program retroactively applicable even to those mileage credits accumulated prior to the changes.

7. The class of persons affected by the foregoing is so numerous, consisting of approximately four million members, that joinder of all members is impracticable.

8. Questions of fact and law common to the Class predominate over questions affecting only individual members of the Class. Common questions of fact and law include the following:

(a) whether defendant breached its contractual obligations when, after plaintiff and each Class member had accepted defendant's offer to join the Program and had travelled upon defendant's airline or used the services of other participants in the Program and had accumulated mileage credits, defendant altered the provisions of the Program so as to substantially and adversely affect each class member's accumulated mileage credits; and

(b) whether defendant violated the Illinois Consumer Fraud and Deceptive Business Practice Act (Ill. Ann. Stat. ch. 121½, § 261, *et seq.*) by the conduct complained of herein.

9. The named Plaintiff and her counsel will fairly and adequately protect the interests of the Class. Plaintiff, like all other members of the Class, had mileage credits

in the Program accumulated prior to June 1, 1988, which were adversely affected by defendant's action in a like manner, though not necessarily to the same extent, as all other members of the Class. Plaintiff is represented by counsel experienced in Class Action litigation.

10. A Class Action is the most fair, just and efficient manner in which to adjudicate the claims arising out of defendant's conduct. Should individual actions be brought, or be required to be brought by each individual member of the Class, the resultant multiplicity of lawsuits would cause undue hardship and expense for the Court and the litigants. The prosecution of separate actions would also create a risk of inconsistent rulings which might be dispositive of the interests of other Class members not parties to the adjudications or substantially impede their ability to protect their interests.

STATEMENT OF CLAIM

11. Through the described solicitation of Class members, defendant made a unilateral offer to plaintiff and each Class member which each accepted by joining the Program prior to June 1, 1988, and by traveling on defendant's airline and/or using the facilities and services of other participants in the Program. As a result, plaintiff and the Class earned mileage credits under the Program which the defendant induced them to retain, increase, and accumulate.

12. As such mileage credits were earned and accumulated by plaintiff and each Class member, each acquired a vested contractual right to receive from defendant, and defendant became contractually obligated to furnish to plaintiff and each Class member, the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned and accumulated. Although defendant reserved the right to restrict, suspend, or otherwise alter aspects of the Program, it could not do so retroactively as to mileage credits which

had theretofore been earned and accumulated under the Program.

13. Among the benefits to which plaintiff and each member of the Class were entitled by reason of the mileage credits earned and accumulated prior to June 1, 1988, were the following: (a) for 12,000 mileage credits accumulated, an upgrade from coach to first class on any one round trip ticket purchased, including discount fare or otherwise restricted tickets with advance purchase requirements tickets; and (b) for varying amounts of mileage credits accumulated, various first class and other class tickets to applicable destinations on available dates for any of a specified number of seats available in that class of service and upgrading of tickets from coach to first class for domestic or international destinations.

14. Effective commencing June 1, 1988, defendant unilaterally commenced a process pursuant to which it is altering the benefits available to participants in the Program, not only with reference to mileage credits earned and accrued thereafter, but also retroactively for all mileage credits which plaintiff and other members of the Class had earned and accumulated prior to June 1, 1988. Furthermore, American's actual and proposed changes are designed to make it substantially harder to earn travel benefits subsequent to July 1, 1989. In addition, American is instituting capacity control restrictions which will make it substantially more difficult for Program members to redeem their mileage credits for the benefits promised to them. These capacity control restrictions include a greater number of blackout dates, during which no flights are available, and limitation of the number of seats allocated to Program members seeking to redeem their mileage credits.

15. American's modified frequent flyer program will have two award levels. One, called Plan AAhead, has lower requirements for benefits but greater restrictions on their use. The other, called AAnytime, requires higher

mileage for benefits but has no blackout dates or other restrictions.

16. In general, travel at peak hours and days—when airlines have the least trouble filling seats—will be available as a frequent flier benefit only in the AAnytime award program.

17. For instance, under the old award structure, it took 50,000 miles to earn two free coach tickets to Hawaii. Under the new structure, it will take 60,000 miles to get two coach itckets under Plan AAhead awards, and 120,000 miles for two AAnytime award tickets.

18. Under the old rules, there are certain blackout dates when awards cannot be used, which was the only major restriction American imposed. In the future, the restricted Plan AAhead awards will be available on "up to 50 percent" of all the available American airliner seats, a substantial reduction for most flights.

19. Another key change reduces the minimum number of miles credited to a member's account for each flight taken, from 750 to 500 or the actual number of miles flown, whichever is greater.

20. Through this unilateral reduction of benefits for mileage credits earned prior to the changes being made and which each traveler was induced by defendant to increase and accumulate, American breached its contract with the plaintiff and each Class member by, *inter alia*, reducing the number of available seats pursuant to which earned mileage credits can be used for benefits, thereby reducing the value of mileage credits accumulated to date and/or to be accumulated.

21. Unless this Court assumes equitable jurisdiction and otherwise so orders, the defendant will not only implement the foregoing changes but will continue to make additional retroactive changes in the benefits offered under the Program.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorneys' fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

COUNT II
(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count I are hereby realleged as if fully set forth in Count II.

STATEMENT OF CLAIM

10-21. Paragraphs 10 through 21, inclusive, of Count I are hereby realleged as if fully set forth in Count II.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class. .

COUNT III
(IN CHANCERY)

CLASS ACTION

1-9. Paragraphs 1-9, inclusive, of Count I are hereby realleged as if fully set forth in Count III.

STATEMENT OF CLAIM

10. Plaintiff and each member of the Class were induced to believe by defendant's solicitations and promises

that by joining the Program and using defendant's airline and/or the services and facilities of other Program participants, each would earn specified mileage credits which, if accumulated, could be redeemed for specified benefits, including air travel tickets and ticket upgrades. By making greater travel benefits available through redemption of correspondingly greater accumulated mileage credits, defendant induced plaintiff and members of the Class to increase, hold and accumulate their mileage credits.

11. Consequently, plaintiff and members of the Class joined the Program and traveled on defendant's airline and/or used the facilities of other Program participants in order to accumulate the greater mileage credits necessary to obtain correspondingly greater travel benefits.

12. Prior to June 1, 1988, plaintiff and members of the Class were entitled to redeem their accumulated mileage credits for specified travel benefits, such as airline tickets and ticket upgrades from coach to first class.

13. Effective commencing June 1, 1988, defendant unilaterally commenced a process pursuant to which it is altering the benefits available to participants in the Program, not only with reference to mileage credits earned and accrued thereafter, but also retroactively for all mileage credits which palintiffs and other members of the Class had earned and accumulated prior to June 1, 1988. Furthermore, American's actual and proposed changes are designed to make it substantially harder to earn travel benefits subsequent to July 1, 1989. In addition, American is instituting capacity control restrictions which will make it substantially more difficult for Program members to redeem their mileage credits for the benefits promised to them. These capacity control restrictions include a greater number of blackout dates, during which no flights are available, and limitation of the number of seats allocated to Program members seeking to redeem their mileage credits.

14. During the year 1988, in particular, defendant induced plaintiff and members of the Class to fly even more frequently on defendant's airline by offering "Triple Mileage" for each actual mile flown. Defendant offered "Triple Mileage" even though it knew that it would change the terms of the Program and institute capacity control restrictions which would have the effect of substantially reducing the value of accumulated mileage credits.

15. At no time did defendant—while inducing plaintiff and members of the Class to earn and accumulate mileage credits—ever advise plaintiff and members of the Class that defendant believed it had reserved the right to retroactively restrict, suspend or otherwise alter or reduce the benefits available under the Program and that defendant would take such action whenever it determined that it would be benefitted by so doing.

16. As a direct and proximate result of defendant's conduct complained of herein, the value of the mileage credits earned and accumulated by plaintiff and members of the Class was substantially reduced.

17. At all times relevant and material to this Complaint, there was in full force and effect, as Section 261, *et seq.*, of Chapter 121½ of the Illinois Annotated Statutes, an Act entitled: "The Consumer Fraud and Deceptive Business Practices Act" (the "Act").

18. The foregoing wrongful acts and omissions of defendant constituted violations of the Act which resulted in plaintiff and each member of the Class suffering damages as described above.

19. Section 10 of the Act authorizes any person who suffers damages as a result of a violation of the Act to bring an action against any other person who committed the violation ,for such relief as the Court deems fit, including reasonable attorneys' fees and costs.

20. The plaintiff, the members of the Class, and the defendant are each "a person" as defined by the Act.

21. Unless this Court assumes equitable jurisdiction and otherwise so orders, the defendant will not only implement the foregoing changes but will continue to make additional retroactive changes in the benefits offered under the Program.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned and accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

COUNT IV
(AT LAW)

CLASS ACTION

1-9. Paragraphs 1 through 9, inclusive, of Count III are hereby realleged as if fully set forth in Count IV.

STATEMENT OF CLAIM

10-21. Paragraphs 10 through 21, inclusive, of Count III are hereby realleged as if fully set forth in Count IV.

WHEREFORE, plaintiff, individually and on behalf of the Class of persons similarly situated, asks this Honorable Court:

A. To certify this claim as a Class Action in order that plaintiff and her attorneys may represent the Class of persons similarly situated;

B. For judgment against defendant for damages in the amount that the value of the mileage credits earned anr accumulated by plaintiff and members of the Class prior to June 1, 1988 was lessened by virtue of the defendant's conduct, together with such punitive damages as may be found appropriate;

C. To enter a preliminary and permanent injunction enjoining defendant from applying retroactively any of the changes in benefits which it has purported to place into effect, as well as any subsequent changes in the Program which defendant may hereafter make which reduce the benefits available under the Program to mileage credits already earned and accumulated;

D. To award costs and reasonable attorney's fees incurred on behalf of the plaintiff and members of the Class in connection with the prosecution of this cause; and

E. For such other relief as this Court may deem fit to grant in fashioning a remedy for plaintiff and members of the Class.

Dated: January 6, 1989.

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APPENDIX I

National Association of Attorneys General,
Task Force on the Air Travel Industry,
Revised Guidelines (Excerpts)

SECTION 3—Frequent Flyer Programs
General Comments to Section 3

Frequent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history. The bargain struck between customers and the airlines has proven to be very costly to many of the airlines. Customers who have accrued the necessary mileage are expecting to collect the awards which led them to join and fly in the programs in the first place. Some airlines are now disturbed by the cost of keeping their side of the bargain and the real possibility that they may lose revenue because passengers flying on frequent flyer awards may begin displacing paying customers. The solution contemplated by some carriers has been to raise award thresholds and implement restrictions to decrease the cost to them of the award program. The effect of these actual and/or potential changes is to significantly devalue vested members' accrued mileage or other credits in the program. Although various frequent flyer program awards materials have contained some obscure mention of the possibility of future program changes, these disclosures have been wholly inadequate to inform program members of the potentially major negative changes which are contemplated by many airlines.

These Guidelines cover frequent flyer programs including any partner airlines or other providers of goods or services such as rental cars and hotel rooms. They are intended to protect those consumers who have participated in these programs in good faith, without adequate notice that the programs could change, and to advise the airlines of how they can reserve this right in the future by adequately providing this information to all members in a nondeceptive manner consistent with state law.

3.0 Capacity controls

1. If an airline or its program partners employ capacity controls, the airline must clearly and conspicuously disclose in its frequent flyer program solicitations, newsletters, rules and other bulletins the specific techniques used by the airline or program partner to control capacity in any solicitation which states a specific award. This includes blackout dates, limits on percentage of seats (for example, "the number of seats on any flight allocated to award recipients is limited"), maximum number of seats or rooms allocated or any other mechanism whereby the airline or program partner limits the opportunities of program members redeeming frequent flyer award levels. To meet this Guideline, all blackout dates must be specifically disclosed.

2. As to awards for vested miles, the airline or program partner must provide the award to the vested member without capacity controls or provide the award with capacity controls within a reasonable period of time. A reasonable period would be within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the vested member requested a reservation, so that the member could not be accommodated without displacing a passenger to whom a seat has been sold, then a reasonable period would be the period to the first available date on which every seat was not sold to the requested destination at the time the program member requests a reservation.

Comment: All of the airlines that met with the Task Force stated that they intended to retain the right to impose capacity controls, in the future, to limit the number of seats available to consumers purchasing tickets with frequent flyer award certificates. The imposition of capacity controls, including blackout dates, has the potential for unreasonably restricting the supply of seats or other benefits in such a way as to significantly devalue the awards due vested program members. NAAG found that this potential limitation has not been adequately dis-

closed to program members in the frequent flyer promotional materials we reviewed. This Guideline puts the airline on notice as to what information they should provide to consumers if they want to impose capacity controls on the use of frequent flyer awards at some future date.

In earlier drafts of the Guidelines the Task Force took the position that capacity controls could not be applied to awards based on any mileage or credits accrued by vested members before they received adequate notice that capacity controls could be imposed. However, as a compromise, and to permit the airlines reasonable flexibility around holiday or other peak travel times, the revised Guideline provides for a reasonable time to accommodate passengers with award tickets: a 31-day "time window" —15 days before and 15 days after the date requested for ticketing. This "time window" allows the airlines to allocate capacity to meet demand over a reasonable, yet defined period of time. In the event all flights to a certain destination are sold out during the entire 31-day time window, ticketing on the next available seat would be reasonable. This approach has the additional benefit of being simple and straightforward to implement with less possibility of customer confusion and frustration.

3.1 Program changes affecting vested members

1. Any airline or program partner that has not reserved the right to make future changes in the manner required by Sections 3.2 and 3.9 of these Guidelines and that changes any aspect of its program (for example, imposition of capacity controls, increases in award levels, or any other mechanism whereby a vested member's ability to redeem any award will be adversely affected) must protect vested program members. Examples which meet this Guideline are:

(a) All vested members may not be adversely affected by that change for a reasonable period [which] would be one year following mailing of notice of that change.

(b) The airline or program partner may allow vested members to lock in any award level which is in effect immediately preceding any change in the program. That award level would be guaranteed for a period of one year after mailing notice of any increase in award levels. A vested member would also be permitted to change his or her selection to lock in a different award in existence at any time prior to an increase in award levels.

(c) The airline or program partner may credit vested program members with miles or other units sufficient to assume that, at the time of any change in the program, the member will be able to claim the same awards he or she could have claimed under the old program.

Comment: This Guideline institutes corrective measures to protect vested members and the mileage they accrued before receiving adequate notice that a program could change to their detriment at some point in the future. The Guideline sets forth three acceptable alternative approaches to allow airlines to change existing programs without unreasonably altering the rights and expectations of vested members. For example, an airline may wish to create a new program with higher award levels for persons who join in the future. Guideline 3.1.1(a) grandfathers in vested members for a one-year period after notice. Guideline 3.1.1(b) grandfathers only a specified locked-in award for a one-year period after the effective date of the change and thereby gives the member an additional year to accrue mileage or units toward a specific award. Guideline 3.1.1(c) allows the program to avoid the administrative problems of distinguishing between old and new members and old and new award levels by equitably adjusting the award levels of the vested members.

These examples are not the only ways in which airlines can reasonably protect vested members when changing existing programs. They are intended to delineate minimum acceptable standards.

3.2 Notice of Changes

1. Adequate notice of changes in current frequent flyer program award levels must be provided to vested program members by the airline or program partner to allow a reasonable time for the vested member to obtain and use an award. For example, a notice no less than one year prior to the effective date of such change would be reasonable. Reduction in award levels would not require such notice. 2. Any airline which has a policy of deleting program members from its mailing list for notices and statements must clearly and conspicuously disclose that policy in plain language in its rules and regulations.

3. To reserve the right to make future changes in the award levels and program conditions or restrictions in a manner providing reasonable notice consistent with state law, which notice is less than the notice set forth in Guideline 3.2.1, an airline must first clearly and conspicuously disclose that reservation and the nature of such future changes, in plain language. This disclosure should include examples which make clear the outer limits within which program awards may be changed. For example, the following is not adequate disclosure:

"Program rules, regulations and mileage levels are subject to change without notice."

This example is adequate disclosure:

"(Airline) reserves the right to terminate the program with six months notice. This means that regardless of the amount you participate in this program, your right to accumulate mileage and claim awards can be terminated six months after we give you notice."

Or:

"(Airline) reserves the right to change the program rules, regulations, and mileage level. This means that (Airline) may raise mileage levels, add an unlimited number of blackout days, or limit the number of seats

available to any or all destinations with notice. Program members may not be able to use awards to certain destinations, or may not be able to obtain certain types of awards such as cruises."

Or, if the airline so intends, the disclosure might also say:

"In any case, (Airline) will make award travel available within — days of a program member's requested date, except for blackout dates listed here."

The airline's right to make future changes, in a manner other than that provided in Guideline 3.1, shall apply only to mileage acrued after members receive the notice required by this Guideline.

Comment: In the past, airlines have attempted to reserve the right to make radical future changes in their programs by using such vague and uncertain blanket language as "Subject to additions, deletions, or revisions at any time." The consumer outrage that ensued when several of the major airlines attempted unilaterally to change their programs in the winter of 1986-87 makes it clear that consumers were not adequately told, when they joined and participated in frequent flyer programs, that they were taking a gamble that the award they were striving for would still be available, at the mileage level originally advertised by the time they accrued the necessary miles. To avoid a recurrence of this same problem in the future, this Guideline provides that the potential for such extensive program changes must be clearly and conspicuously disclosed to the public by specific example. It also puts the airlines on notice that (1) their previous attempts to disclose this critical information have been inadequate (2) if they intend to reserve the right to make such changes in the future, they must give members new and different notice, and (3) as to vested members, airlines cannot implement any adverse changes until one year after notice is given. One year is deemed rea-

sonable because many consumers can only travel during particular periods of the year due to work or family constraints, and therefore notice of less than a year may impact unduly harshly on a particular class of program members.

If an airline wants to reserve the rights to change the terms of its program without giving its members one year's notice (1) it can do so only after clear and adequate notice has been given to the program members and (2) this reduced standard can apply only to mileage accrued after clear and adequate notice has been given.

NAAG discovered that many airlines delete program members from their mailing lists if they are determined to be "inactive." Inactive is defined differently by each airline, but generally includes some formula requiring active participation in the program within a six to ten month period prior to any given mailing. Because crucial information regarding changes is included in program mailings, the Guidelines require that any airline with a policy of deleting program members from its mailing list clearly and conspicuously disclose that policy in the rules and regulations distributed to all program members when they join.

3.3 Fare or passenger class limitations

Any limitation upon the type or class of fare with which an upgrade certificate, discount flight coupon, or free companion coupon may be used must be clearly and conspicuously disclosed before the program member claims the award. Disclosure of the fare by airline terminology (for example, "Y Class") is not deemed sufficient.

Comment: Many airlines are encouraging consumers to use their accrued mileage or credits to obtain upgrade certificates or free campaign coupons, rather than free tickets because this is more cost effective for the airlines. Many of these coupons and certificates can be used only

in conjunction with a regular coach fare ticket. Because of the high cost of a full coach ticket (often disclosed only as "Y Class") many of these coupons and certificates represent no real savings and therefore are useless to consumers. This Guideline requires that any such restriction be clearly disclosed to consumers before the award is claimed.

3.4 Certificates issued for vested miles

Certificates, coupons, vouchers, or tickets issued by an airline for awards redeemed for vested miles must be valid for a reasonable period of time. One year is deemed to be reasonable. Any restrictions on use, redeposit, extension, or re-issuance of certificates must be clearly and conspicuously disclosed on the certificate and in any rules, regulations, newsletter or other program materials.

Comment: Again, because many consumers may only travel during certain periods of the year, fairness requires that awards be valid for at least a full twelve month cycle.

3.5 Fees

Any airline which charges a fee for enrollment in its frequent flyer program must fully disclose at airline ticket counters and in all advertisements, solicitations or other materials distributed to prospective members prior to enrollment all terms and conditions of the frequent flyer program. Such disclosure must be made prior to accepting payment for enrollment in the airline's program.

Comment: Some airlines have required that consumers fill out a membership application and pay a membership fee before obtaining a copy of the program rules and regulations. Because of the serious restrictions that can apply to a travel reward program, it is essential that all consumers have an opportunity to review all of the program rules and regulations before paying an enrollment fee.

3.6 Redemption time

All airlines must disclose clearly and conspicuously the actual time necessary for processing award redemption requests where such requests are not normally processed promptly. An example of prompt processing would be within 14 days of processing the request. An example of a disclosure would be "processing of awards may take up to 30 days."

Comment: The airlines indicated that full disclosure of redemption time will not be a problem.

3.7 Termination of program affecting vested members

In the event a frequent flyer program is terminated, adequate notice of termination must be sent to all vested members so that vested members have a resonable time to obtain awards and use them. Adequate notice would be notice at least one year prior to the termination of the program. Award levels in existence prior to such notice should remain in effect for one year. Program members should then have one year to use certificates, coupons, vouchers or tickets. Any applicable capacity controls should be modified as necessary to meet the demand for all award benefits due program members.

Comment: The airlines uniformly take the position that because participation in travel reward programs is "free," an airline should be able to terminate a travel reward program at any time without notice. NAAG strenuously disagrees. Consumers pay significant consideration for the airlines' promise to award them "free tickets" and other awards. Program members fly on a particular airline to accrue mileage in a travel reward program often foregoing a more convenient departure time, a more direct flight, and even a less expensive ticket. Those consumers who kept their part of the bargain have a right to expect the airlines to keep theirs, regardless of the cost. This Guideline affords consumers reasonable protection against unilateral changes. It gives consumers one year to accrue the mileage to reach a desired award level and one year to use the award.

This Guideline is intended to apply to programs that are terminated due to mergers or for any other reason. It would be unconscionable to permit airlines, which have reaped the rewards of these travel incentive programs, to walk away from their obligations to consumers under any circumstances.

3.8 Restrictions

All material restrictions on frequent flyer programs must be clearly and conspicuously disclosed to current program members and to prospective members at the time of enrollment.

Comment: This Guideline is intended as a corrective measure. Any airline that has not clearly and conspicuously disclosed material program restrictions to vested members should do so now. New members are entitled to full disclosure at the time of enrollment.

3.9 Method of disclosure

Disclosures referred to in these Guidelines should be made in freqeunt flyer program solicitations, newsletters, rules, and other bulletins in a clear and conspicuous manner so as to assure that all program members receive adequate notice. As used in these Guidelines, disclosure also refers to information on program partners.

Comment: The brochures containing the rules and regulations for airlines' frequent flyer programs have been as long as 52 pages. Extremely important restrictions are often buried under inappropriate topic headings or hidden on the back of the last inside pages of the brochure. This Guideline requires that restrictions be disclosed in reasonable print size in a location that will be most helpful and informative to consumers.

Any reservation of the right to make future changes in a program is so significant to consumers that it should be disclosed prominently to insure that the maximum

number of people see and read this restriction. The Guideline permits the airlines flexibility to determine when and how often a disclosure must be made so long as the airline discloses the information in a manner which gives meaningful notice to all affected members.

One airline complained that Guideline 3.9 is unreasonable because it proposes that all the restrictions be disclosed at the beginning of the program brochure. In fact, the only disclosure the Guidelines suggested listing at the beginning of a brochure is the reservation of the right to change the program prospectively. The significance of such a restriction—that the terms and conditions of the program can change at any moment—is so critical that potential members should be made aware of it immediately. All other disclosures can be made in the text of the brochure.

APPENDIX J

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 29th day of May, 1992

Docket 46280

COMPLAINT OF ASSOCIATION OF
DISCOUNT TRAVEL BROKERS

against

CONTINENTAL/EASTERN TARIFF, C.A.B. No. 409

Docket 47539

RULEMAKING PETITION OF ASSOCIATION OF
DISCOUNT TRAVEL BROKERS

on

FREQUENT FLYER PROGRAMS AND AWARDS

ORDER DISMISSING COMPLAINT AND DENYING PETITION FOR RULEMAKING

On May 8, 1989, the Association of Discount Travel Brokers ("the Association") filed a complaint against a

tariff of Continental Airlines, Inc. and Eastern Air Lines, Inc. that revised their One Pass frequent flyer program's rules and awards.[1] On May 16, on behalf of itself, Eastern, and One Pass, Continental filed a motion for leave to file out of time, which we will grant, and an answer in opposition to the Association's complaint.

Subsequently, on May 13, 1991, the Association filed a petition for rulemaking on the use and transfer of frequent flyer program awards. Trans World Airlines, Inc. ("TWA") in conjunction with Northwest Airlines, Inc. ("Northwest"), American Airlines, Inc. ("American"), Delta Air Lines, Inc. ("Delta"), and Continental Airline, Inc. ("Continental") filed responses to the petition for rulemaking. The Association then filed a reply to the responses.

For the reasons stated below, we will dismiss the complaint and deny the petition for rulemaking.

I. Tariff Complaint

A. The Complaint

The Association challenges the following revisions to the Continental-Eastern One Pass Tariff:

(a) the revision reserving the right to modify, suspend, restrict, or otherwise alter all or part of the One Pass program upon 60 days' notice to active members;

[1] Under sections 221.250 and 302.505(b) of the Department's regulations (14 CFR 221.250 and 302.505(b)), a complaint requesting suspension of a tariff must be filed within ten days after the tariff's issuance date. The Association states that the geographically diverse situation of its members prevented it from meeting this deadline. We will treat this statement as a requset for leave to file an otherwise unauthorized document (see 14 CFR 302.4(f)), which we will grant.

Since the filing of the complaint, Eastern Air Lines, Inc., has undergone liquidation under Chapter 7 of the bankruptcy laws.

(b) the revision making fraud or abuse concerning One Pass mileage credit or reward usage subject to penalties, inluding termination of participation in the program and forfeiture of all accrued mileage, reward certificates, and tickets issued against reward certificates;

(c) the revisions banning the sale, barter, or purchase of One Pass rewards, defining the sale, barter, and transfer of rewards or certificates other than as expressly permitted as fraud or abuse, making any rewards obtained by fraud or abuse void if transferred for cash or other consideration, and declaring that persons other than the individuals named on certificates who attempt to use them will be denied transportation and the certificates deemed void; and

(d) the revision providing for capacity controls that limit the availability of seats offered for reward travel on certain flights and during certain times of the year.

The Association challenges the tariff as procedurally deficient, restrictive to price competition in air transportation, and unfair and unreasonable to consumers. First, it claims that these four provisions make material changes to the existing tariff "that severely restrict the benefits and rights of the frequent flyer." Contending that section 221.165 of the Department's rules (14 CFR § 221.165) requires an explanation for such substantive changes to consumer benefits, the Association argues that Continental's and Eastern's failure to supply such information violates our rule.

Second, the Association claims that its members conduct a legitimate business as discount brokers, and it charges Continental and Eastern (as well as other air carriers with frequent flyer programs) with improperly attempting to destroy this business. It is to this end, according

to the Association, that the airlines "started to include restrictions against transferability in the tariff, together with capacity controls, blackout dates[,] and the unilateral right for the airline to do as it desired to any part of its program." [2]

Third, the Association charges the Department of Transportation with failing to protect consumers by not adequately reviewing frequent flyer rules filed as tariffs. The Association also accuses the Department of granting Special Tariff Permission to frequent flyer tariffs without a showing of emergency or merit in violation of section 221.190 of our own rules (14 CFR § 221.190). It argues that once these tariffs have been approved, if carriers successfully argue in lawsuits that they have the force of law, consumers have no recourse.

Fourth, in addition to these general complaints, the Association states specific grievences against each of the four revisions listed above. The Association challenges revision (a) on the grounds that guidelines adopted by the National Association of Attorneys Generals ("NAAG") for frequent flyer programs would require notice of at least one year before an airline could terminate its program. The Association challenges revision (b) by claiming that the Department has never considered the reasonableness of such restrictive provisions and should do so "before allowing the consumer to be unreasonably penalized." It challenges revision (c) as a direct and illicit means of driving discount coupon brokers out of business. It challenges revision (d) as a tool that allows the airlines unfairly to "lure the consumer to fly . . . on the promise that the rider will earn a free trip to an exotic destination" and then either increase the mileage premium for that trip or dractically limit its availability.[3]

[2] Complaint of Association at 9.

[3] Here, as in the case of revision (a), the Association cites the NAAG guidelines, which would require carriers to provide awards

Based on its allegations, the Association asks the Department to investigate the One Pass revisions and suspend the tariff.

B. The Answer

On behalf of itself, Eastern, and One Pass, Continental opposes the Association's complaint. In response to the contention that the Department has not adequately reviewed frequent flyer tariffs, Continental states that in 1988, the Department concluded after an informal investigation that One Pass's rules and tariff on capacity controls were proper and that there was no evidence of unfair or deceptive practices within the meaning of section 411 of the Federal Aviation Act.[4]

In response to the other allegations, Continental argues that the Association has misconstrued and misrepresented the nature of the relationship between frequent flyer programs and their members. Continental contends that the bulk of One Pass earnings and travel concern domestic air transportation, in which the relationship between air carriers and passengers has been governed since 1983 solely by contract law.[5] Continental characterizes the revisions challenged by the Association as legitimate terms of the carriers' unilateral offer and part of their legitimate contract with One Pass members.[6]

either without capacity controls or, if capacity controls apply, within 15 days before or after the date originally requested. If all seats within this 31-day period were sold at the time the request was submitted, then the guidelines would require the airline to provide a seat on a date as close as possible to the date requested.

[4] Response of Continental at 2-3.

[5] Continental claims that One Pass gives its members copies of the program's rules when they apply for membership and keeps them apprised of all changes.

[6] Continental argues, with many case citations, that a common carrier may prohibit its customers from selling their rights to travel at reduced fares and that in particular, an air carrier may prohibit the sale of its frequent flyer awards.

Continental denies that the challenged revisions are novel and asserts instead that they predate the tariff filing and have the force of contract apart from their inclusion in the tariff.[7] Specifically, Continental asserts, these provisions have formed part of the One Pass program since its inception, and the program's applicants and members have always been notified of all applicable terms and conditions, including these provisions.

As for capacity controls, Continental denies that it or Eastern engages in misleading advertising, fails to provide award transportation at the mileage advertised, or fails to provide adequate capacity for award travel. Continental asserts that it and Eastern scrupulously adhere to the capacity provisions in the One Pass terms and conditions, and it repeats its assertion that these provisions have always been part of the program.[8]

II. Rulemaking Petition

A. The Petition

The proposed rulemaking has four principal elements: (1) elimination of sales and transfer restrictions on awards, (2) elimination of excessively restrictive capacity controls, (3) elimination of unreasonable blackout dates, and (4) notice of program changes.[9] The Association claims that the proposed rule is designed to establish a uniform, nationwide frame of reference for resolution of the areas of major controversy surrounding the award, transfer, sale, or use of frequent flyer mileage

[7] According to Continental, substantially all of One Pass terms and conditions now appear in the tariff.

[8] Continental asserts that the original One Pass terms and conditions stated as follows:

> Reward usage is subject to capacity controls which limits [*sic*] the availability of seats offered for for reward travel on certain flights and during certain times of the year.

[9] Association Petition for Rulemaking at 7-8.

awards. The Association's arguments in support of its claims are substantially similar to those in its complaint and include the promotion of competition among air carriers, the protection of consumer interests from allegedly deceptive and unfair practices [under § 411 of the Federal Aviation Act], such as capacity controls, blackout dates, award structure/mileage requirements, and transferability restrictions, and the prevention of the airlines' improper attempt to destroy a legitimate business.

The Association analogizes the frequent flyer program with the "S&H Green Stamps frequent buyer program" at issue in *In re Sperry & Hutchinson Co.*, 73 F.T.C. 1099 (1968). The Federal Trade Commission in that case initially found similar acts, such as the transferability restrictions, to have violated the FTC Act, a statute the Association argues is substantially the same as § 411 of the Act.

B. The Responses

The respondents generally oppose the proposed regulations on the basis that (1) they deal with issues already resolved in court or pending in litigation, (2) they are impracticable, (3) discount brokers conduct illegal activity by defrauding the airlines, and (4) frequent flyer program rules are not unfair or discriminatory.

The respondents contend that the proposed regulations address issues that have already been resolved in the courts or are subject to pending litigation. American, in particular, notes that recent court decisions are based on longstanding precedent and principles confirming that "(1) a prohibition against purchasing and selling frequent flyer awards is a valid and enforceable contractual restriction on assignment; and (2) there are no complex unresolved issues—and never were—regarding the illegality of the brokers' conduct." [10] American further notes

[10] Response of American at 7.

that virtually every argument that the Association advances in its petition failed to gain acceptance in frequent flyer litigation, including the premises that frequent flyer members have vested property rights to travel awards and that airline program rules are unfair trading practices and violate the Sherman Act. American and Delta specifically note that, under the final FTC consent order, S&H was expressly *permitted* to continue to restrict the transferability and exchange of its stamps. *Sperry & Hutchinson Co.*, 83 F.T.C. 478 (1973).

According to American and the other respondents, the Association is in effect asking the Department to legitimize the allegedly illegal activities of the discount brokers, who engage in systematic fraud and deception in order to conduct their business. According to the TWA/Northwest response, these activities may constitute criminal activity pursuant to 18 U.S.C. § 1343 and 18 U.S.C. § 1341. American alleges that some brokers' contracts with their customers use indemnification language that makes the customers liable for the brokers' unlawful conduct.[11] In fact, American claims that the brokers often use the same contract transferability restriction with their own customers that they claim is unfair and discriminatory on the part of airlines.[12] Delta contends that the brokering operations violate the Lanham Act and commercial disparagement, false advertising, and unlawful racketeering activities in violation of the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.

Furthermore, the respondents contend that it would be impracticable for the Department to involve itself in what are essentially business decisions regarding ongoing advertising and promotional programs. Frequent flyer programs extend beyond the airlines to telephone companies,

[11] *Id.* at 12.

[12] *Id.*, at 11, footnote 11.

car rental companies, hotels, and credit card companies through which ancillary mileage credits can be accumulated. Consequently, awards also extend beyond free or reduced rate transportation to free or reduced rate rental cars, hotel accommodations, rail transportation, and other benefits. The respondents also argue that, if the Department adopts the proposed rule, these ancillary industries, although affected, would be beyond the jurisdiction of the Department." [13]

The respondents also contend that market forces are in a better position than the Department to correct any perceived abuses in the frequent flyer program. Presumably the first airline to adopt the "fairer" rules would gain an immediate increase in business if the present rules are as restrictive and unfair as the petitioner suggests.

The respondents take exception to the petitioner's allegations of deceptive and unfair practices. The TWA and American programs were not as wide open at their inception as the petitioner suggested. For example, mileage could only be accumulated on domestic flights, and the program was originally offered as a limited-time promotional campaign. Benefits have expanded dramatically because of market forces. With time, the program rules were liberalized by, among other things, adding other carriers as travel partners and allowing consumers to accumulate mileage on international flights. Moreover, the respondents claim that they need a certain amount of flexibility in meeting consumer needs.

The respondents claim that past changes to program award structures have not been as injurious as alleged by the petitioner. TWA specifically notes that its increase in the mileage award levels only affected certain routes. Most of the award levels remain the same as in 1981,

[13] Responses of American and TWA at 16-17 and 4, respectively.

when TWA offered only six awards in comparison to the present 60 awards. In 1990, TWA established an Equity Miles program which allows all members with previously accumulated mileage to claim awards under either the old or new award structure. American offers flight upgrades to its member who fly so much that they arguably do not want a free trip. Delta also claims that in many cases awards are now available for lower mileage than in the early 1980s.

The respondents assert that members have had sufficient notice of the programs' governing rules. For at least eight years the contract terms of the TWA program have included a prohibition against barter, trade, or sale of the award certificates, notification of some capacity control, and notification that program rules were subject to change at any time. Similarly, American has had the same no-sale rule printed on its travel awards since 1983. In addition, Delta's initial rules provided that the awards were "non-trasferable". In 1983 and 1985, Delta clarified these rules.

American specifically criticizes the other proposed provision regarding capacity controls and notice of program changes. For example, American characterizes the proposed provision regarding capacity controls as both "meaningless and impossible" because it would prohibit capacity controls of any type unless all seats on a flight were already reserved, including by an unlimited number of passengers using frequent flyer awards.[14] Moreover, American asserts that the Association's proposed prohibition of *all* capacity controls for two full years would make it impossible for carriers to take any measures to limit revenue displacement during that period. Similarly, Continental notes that if carriers were to be forced by regulation to make available free seats without time or route or capacity limitations, and deny themselves needed revenue, they could be forced to eliminate frequent flyer programs altogether.[15]

[14] Response of American at 18.

C. Reply

The Association takes exception to the respondents' arguments on five grounds. First, the Association contends that the requested rulemaking is an appropriate exercise of the Department's enforcement jurisdiction under Section 411. Second, it claims that local civil court actions do not justify the summary rejection of the petition. Third, the Association claims that the petition cannot be summarily rejected on competition, cost, or industry impact grounds. It states that it does not propose any mandatory inter-carrier transfer of frequent flyer program mileage or awards, and the proposed rule is not inconsistent with reasonable carrier efforts to promote brand loyalty. The Association claims that no carrier has disputed its claim that the proposed rule can be implemented without appreciable economic harm to the industry, and it views the suggestions that the frequent flyer programs might be discontinued as unsubstantiated threats. Fourth, the Association claims that the petition cannot be summarily rejected as demonstrably unworkable. Finally, it argues that efforts to squelch secondary markets are not presumptively lawful, but rather highly suspect. It takes issue with the carriers' responses concerning the antitrust considerations of *Sperry & Hutchinson*.

III. Disposition

The One Pass revisions do not violate the Federal Aviation Act or any pertinent rules or policies of this Department. In addition, adoption of the proposed regulations is not warranted. We therefore dismiss the Association's complaint and deny the petition for rulemaking.

We have already addressed some of the issues raised in the complaint in Order 89-9-25, in which we dismissed the Association's complaint against revisions by American

[15] Response of Continental at 3.

Airlines to its frequent flyer program. We held in that order that rules governing frequent flyer programs—as distinguished from the schedule of bonus award levels—are not required to be filed as tariffs. We also held that even if carriers do file them as clarifying information, such filing does not give these rules the legal effect of a federally approved traiff. The Association has made no effort to show why our conclusions in Order 89-9-25 are not applicable here.[16] Continental correctly describes the relationship between frequent flyer programs and their members as a contract in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.[17]

Because program rules are not required to be filed and do not have the legal effect of a Federally-approved tariff, the Association's procedural challenges regarding the sufficiency of Continental's and Eastern's explanation of their revisions, a showing of emergency or merit, and the sufficiency of the Department's review must be rejected.

As for the adoption of rules regulating certain aspects of the airlines' frequent flyer programs, the Association's rulemaking petition rests on its assumption that the carriers' restrictions on the transfer or sale of frequent flyer awards, their current capacity control and blackout date practices, and their allegedly inadequate notice to consumers constitute unfair and deceptive practices and un-

[16] For an explanation of this policy, see Order 89-9-25, at 4-5.

[17] Continental does err, however, in stating that in domestic air transportation, the relationship between carriers and passengers is governed solely by contract law. Section 411 of the Act, with its prohibition of unfair and deceptive practices and unfair methods of competition, still applies to domestic air transportation as well as to international air transportation, as do various regulations issued under its authority: *see, e.g.*, 14 CFR Parts 373 (concerning consumer credit), 250 (concerning denied boarding compensation), and 399.88 (concerning code sharing).

fair methods of competition in violation of section 411.[18] The Association has failed to show, however, that the practices it challenges may violate section 411. We are therefore denying the Association's rulemaking petition.

The Association argues in part that its proposed rules are required because the carriers have engaged in deceptive practices, since program members have allegedly received too little evidence notice of changes in the programs and of such restrictions as the prohibition against giving frequent flyer awards. The Association therefore asks that we adopt rules requiring carriers to give "reasonable" advance notice of capacity controls, 180 days' notice of blackout dates, and one year's notice of program changes that make it harder for members to earn or use awards.

We find that the Association has not shown that the carriers' conduct misleads or is likely to mislead program members. It has provided statements by some program members that they were unhappy with certain program changes or surprised to learn that awards could not be used on some routes at some times. Petition at 77, 82. It further alleges that most program members think they have the right to sell their awards. Petition at 38, 39. This evidence is insufficient to demonstrate actual or potential deception, and no program materials have been produced that substantiate the allegation. The Association has not shown that members are unaware that carriers reserve the right to change the terms of the programs or impose blackout dates and capacity limits. More importantly, the Association has not attempted to show that the actual notice given by any carrier is in fact inadequate. The carriers, on the other hand, state that they have given members notice of the transfer restrictions and

[18] The Association does not seek a prohibition of frequent flyer programs or even a prohibition of all use of capacity controls and blackout dates. Petition at 2, 60, 80, 84.

program changes. The carriers also assert that they have repeatedly informed members that the program terms could be changed at any time. *See, e.g.*, Delta Response at 4-5; TWA/NW Response at 8. Given this evidence, we see no need for a general rulemaking of the type requested by the Association.

The Association further argues that a rulemaking is necessary because the challenged carrier practices are unfair methods of competition. However, the Association has not demonstrated that the carriers' frequent flyer program practices violate the antitrust laws or are analogous to antitrust law violations. In fact, the Association states that it does not claim that frequent flyer programs violate the Sherman or Clayton Acts. Petition at 60. It has also not tried to show that the program practices at issue are analogous to antitrust law violations. Consequently, the Association has failed to show that the program practices at issue are unfair methods of competition. *Cf. Continental Air Lines v. American Airlines*, Order 85-12-69 at 6 (December 24, 1985); *Air Florida v. Eastern Air Lines*, Order 81-1-101 (January 21, 1981). Furthermore, one court has held that TWA's program restrictions did not violate sections 1 or 2 of the Sherman Act. *Trans World Airlines v. American Coupon Exchange*, 682 F. Supp. 1476, 1485-1488 (C.D. Calif. 1988), *rev'd in part on other grounds*, 913 F.2d 676 (9th Cir. 1990).

While the Association nonetheless claims that the program terms at issue (*e.g.*, transfer restrictions) unreasonably limit competition, it has not explained in any detail how those practices could have such an impact. The Association asserts, for example, that the carriers' current operation of the programs keeps new firms from entering the airline industry. Petition at 4, but it never explains why its proposed rules would encourage entry or why the carriers' prohibition against selling awards discourages entry.

The carrier restrictions on the sale of awards may put the Association's members out of business by making the purchase and sale of frequent flyer awards difficult or impossible. Petition at 61-62. Nevertheless, in other industries the courts have held that a producer of a product may terminate the distribution of its product through independent wholesalers and instead distribute the product itself to consumers, at least if it has not engaged in predatory conduct and has a legitimate reason for the change in distribution. *See, e.g., Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 872; *Naify v. McClatchy Newspapers*, 399 F.2d 335 (9th Cir. 1979). In these circumstances, a carrier's exercise of this right with respect to program awards does not violate the antitrust laws or their spirit.

Furthermore, as is apparent from the Association's own pleadings, the carriers use their programs as a means of competing for passengers. *See, e.g.*, Petition at 19, citing Delta's triple mileage promotion. *See also Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems*, prepared by the Secretary's Task Force on Competition in the Domestic Airline Industry, at 39. Since the programs began, each carrier has greatly expanded the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive. *See, e.g.*, TWA/NW Response at 5-8; American Response at 3. These facts contradict the Association's contention that the carriers operate the programs so as to reduce competition.

We also find that the program terms at issue are not unfair practices, within the meaning of section 411. In administering section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the model for section 411, the FTC has stated that a firm's conduct may be an unfair practice if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing

benefits. Petition at 56-57. *See also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n. 5 (1972). The Association has not shown that the specific practices challenged by it should be proscribed on these grounds.[19] The Association does not claim that the program terms at issue are immoral. They also do not appear to be contrary to any established public policy. In an analogous situation, the courts have found that carrier restrictions on the transfer of tickets do not violate public policy principles. *Bitterman v. Louisville & Nashville R.R.*, 207 U.S. 205, 221-222 (1907); *Trans World Airlines v. American Coupon Exchange*, 913 F.2d 676, 686-689 (9th Cir. 1990).[20]

The challenged program features, moreover, do not appear to cause unwarranted consumer injury. Instead, they seem to be legitimate methods for controlling the cost of frequent flyer plans. Without such restrictions, carriers might choose to terminate or cut back the programs. As American puts it, "Like all marketing programs, what makes frequent flyer programs possible is precisely the mutually beneficial balance which enables airlines to offer such extraordinary and valuable benefits to their members *without* suffering substantial revenue loss." American Response at 17. Even the Association admits that capacity controls and blackout dates serve a legitimate

[19] The carriers, on the other hand, argue that we should deny the Association's petition because its members' purchase and sale of awards violates several statutes and involves the use of fraud. We need not address these contentions, for the Association has not justified conducting its proposed rulemaking under section 411.

[20] The Association complains that the restrictions on using and selling awards keep corporations from using awards for business purposes, even though many program members accumulate award miles on trips paid for by their employers. Petition at 32-37. No corporation has supported the Association's petition, however, and some corporations have developed methods of recapturing awards. Petition at 35-36. Corporations can also develop means of ensuring that employees purchase the cheapest available fare rather than buy a ticket enabling them to earn award miles. Airline Marketing Practices, *supra*, at 18, 19-20.

purpose by reducing the number of paying passengers displaced by users of program awards. Petition at 80, 84. Restrictions on the transfer of awards similarly limit carrier costs and revenue losses.

The Association's petition assumes in large part that we should prohibit practices considered unfair by some consumers or businesses, even if they involve no deception or threat to airline competition. This is an incorrect reading of section 411, for that section does not give us unlimited authority to regulate airline practices. To adopt the more expansive interpretation of section 411 proposed by the Association, would frustrate Congress' decision that the public will benefit if airline fares and services are determined by market forces rather than government regulation. *See Order* 89-9-25 (September 13, 1989) at 4-5. Furthermore, even apart from Congress' decision to deregulate the airline industry, the courts have held that section 5 does not give the FTC unlimited authority to proscribe competitive practices that it considers unfair or undesirable. *See, e.g., E.I. DuPont Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917.

Although it has failed to show that the carrier practices violate section 411 under our precedent, the Association argued that a Federal Trade Commission proceeding involving S&H green stamps supports its contention that the carriers' practices should be deemed unfair methods of competition under section 411. Association Reply at 27-32. We disagree. In that proceeding, begun in the late 1960's, the FTC initially held that Sperry & Hutchinson, the seller of S&H green stamps, could not block trading stamp exchanges from buying, selling, and trading green stamps with consumers. After the courts vacated this FTC order, the agency settled the case in a way which did not block Sperry & Hutchinson from seeking to enjoin the future operation of such stamp exchanges. That resolution of the case is, of course, contrary to the Association's position here.

Finally, the Association argues that the airline industry and program members would benefit if we established uniform rules for the programs, since various state and federal courts may in effect regulate the programs through their adjudication of individual contract suits. This process assertedly may result in each state having its own rules or in the lack of any regulation of the programs, given the carriers' arguments that the states are pre-empted by section 105 of the Act, 49 U.S.C. 1305, from regulating the terms of frequent flyer programs.

This argument provides no basis for adopting the rules sought by the Association. First, even if uniform regulation were desirable, we could adopt such rules only if the carriers' conduct violated section 411.[21] As shown, the Association has failed to show that such violations may have ocurred. Secondly, this argument assumes that some agency should be closely regulating the terms and conditions of frequent flyer programs. We disagree in light of Congress' decision to deregulate the airline industry.

In addition, we doubt that our lack of regulations will lead to significant confusion. Even though some courts have held that general state contract laws may apply to airline-consumer relationships, such state contract laws of general applicability cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable, to the extent they relate to an airlines' rates, routes and services. Such state regulation is preempted under section 105 of the Act.

ACCORDINGLY, I dismiss the tariff complaint and deny the petition for rulemaking in these dockets.

By:

JEFFREY N. SHANE
Assistant Secretary for Policy
and International Affairs

(SEAL)

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[21] *See United Air Lines v. CAB*, 766 F.2d 1107 (7th Cir. 1985).

No. 93-1286

In The

Supreme Court of the United States

October Term, 1993

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

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March 10, 1994

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QUESTION PRESENTED

Whether the Court should review the decision of the Illinois Supreme Court, which, per the Court's instructions on remand, applied the *Morales* test in determining that Section 1305 of the Airline Deregulation Act does not pre-empt state law claims arising out of American's breach of contract and fraud in connection with its AAdvantage marketing club, because the claims based on the AAdvantage club are too tenuous, remote or peripheral to airline rates, routes and services to warrant pre-emption.

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OPINIONS BELOW

Besides the opinions and judgments delivered in this case listed in Petition for Writ of Certiorari ("Petition") filed by American Airlines, Inc. ("American") at 1, the following opinions and judgments have been delivered in this case: (1) *Wolens v. American Airlines, Inc.*, 565 N.E.2d 258 (Ill. App. Ct. 1990) (App. at 31a);[1] *Wolens v. American*

[1] References to the Appendix to the Petition are cited as "App. at ___." References to the Appendix to Brief of Respondents in Opposition to Petition for Writ of Certiorari are cited as "Opp. App." at ___.

Airlines, Inc., No. 88 CH 7554, slip op. (Ill. Cir. Ct. Mar. 20, 1989) (App. at 41a); (5) *Wolens v. American Airlines, Inc.*, No. 88 C 8158, 1988 U.S. Dist. LEXIS 12,026 (N.D. Ill. Oct. 25, 1988) (decision to remand state court action) (Opp. App. at 1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the express pre-emption provision of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1305(a)(1), cited in the Petition, the statutory section which saves existing remedies is particularly relevant here:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

STATEMENT OF THE CASE

A. The AAdvantage Program.

Plaintiffs-respondents ("plaintiffs") are members of American's "frequent flyer" club, known as the "AAdvantage Program." American and the other AAdvantage Program participants – including hotels, bank credit cards, a long distance telephone network, car rental agencies, money market funds, sellers of merchandise and other airlines – offer club members credits which they can

use to secure various benefits offered by the participants. Anyone who joins the AAdvantage Program can earn awards without ever flying, and can use those awards to obtain significant non-airline travel benefits offered by participants.[2]

American induced plaintiffs to apply for membership in the AAdvantage Program by telling them that the greater the AAdvantage credits earned, the greater the benefits they would be entitled to receive. *See Wolens* Complaint ¶ 2; *Tucker* Complaint ¶ 2 (App. at 49a, 62a). Plaintiffs accepted American's offer to become Program members, and proceeded to accumulate substantial credits by using the facilities and benefits of participants in the AAdvantage Program, even if doing so was more costly and less convenient than using non-participants' facilities and benefits. *See Wolens* Complaint ¶¶ 3, 4; *Tucker* Complaint ¶ 5 (App. at 49a-50a, 62a-63a).

In the late spring of 1988, American *retroactively* imposed restrictions on members' use of their previously earned AAdvantage credits, unilaterally altering the terms of its contract with the AAdvantage Program members. *See Wolens* Complaint ¶ 14; *Tucker* Complaint ¶ 14 (App. at 52a, 65a). These restrictions substantially reduced the value of the AAdvantage credits previously

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[2] While non-airline travel benefits are involved in the AAdvantage Program, American claims that such benefits "were not challenged" here. Petition at 3 n.2. This is misleading. By breaching its contracts with members in the AAdvantage Program, American diminished the value of the AAdvantage credits earned by club members from both American and the non-airline participants.

earned by Program members. *See Wolens* Complaint ¶ 4; *Tucker* Complaint ¶ 6 (App. at 49a, 63a). Although American had reserved the right to restrict, suspend, or otherwise alter aspects of the Program, it never reserved the right to do so *retroactively* so as to diminish the value of the AAdvantage credits previously earned and accumulated by Program members.[3]

The AAdvantage Program is, in essence, a marketing tool for American to compete with other airlines for customers, as American acknowledges. *See* Petition at 3. American solicited customers to join the AAdvantage Program separate from soliciting customers to buy American's flight services – that is, tickets to fly on American. American's airplane tickets do not contain the AAdvantage Program terms, but detail the labor exchange inherent in air travel. Similarly, the AAdvantage program contracts are completely independent of the ticketing contract. Thus, when American breached its contracts with and defrauded AAdvantage members, it breached a non-flight contract unrelated to its services, its rates or its routes. The effect of American's breach of contract and fraud was to damage plaintiffs, who purchased goods and services of American and its Program participants with the promise that they would receive credits with a

[3] While American suggests that its modifications to the AAdvantage Program have been beneficial (*see* Petition at 4), that assertion is not supported by any facts in the Record. More fundamentally, American does not have the right to breach its agreement with Program members in ways which decrease the value of the AAdvantage awards even if other modifications to the Program increase the value of those awards. Contract law does not provide an "offset" mechanism.

certain value, only to find that American unilaterally and retroactively reduced the value of those credits.

B. The Proceedings Below.

American's argumentative description of the proceedings below misstates several relevant facts. First, American selects certain phrases from paragraph 13 of Wolens' complaint and couples them with phrases from other sources to create a totally misleading impression of plaintiffs' claims. *See* Petition at 5. In fact, paragraph 13 makes no specific claim but merely describes the AAdvantage Program terms which American unilaterally changed, causing damages. Plaintiffs never alleged – and do not concede – that their claims for relief relate to airline services or rates.

Next, American's description of the Illinois Supreme Court's initial decision (Petition at 6) omits a significant basis for its finding that plaintiffs' claims were not pre-empted: the fact that the breach of contract and fraud claims arising from the AAdvantage Program were only tangentially related to American's rates, routes and services.

Finally, American misstates the methodology and ruling of the Illinois Supreme Court decision at issue here. *See* Petition at 9. Contrary to American's claim, the court did not adopt any test for pre-emption other than the test required by *Morales*. Moreover, the court did not base its decision on just two specific reasons – rather, it fully considered all the facts alleged and applied the *Morales* test to reach its conclusion that the claims were not pre-

empted. For an accurate description of the court's ruling, *see infra* at 11-13.

SUMMARY OF ARGUMENT: THERE ARE NO CONFLICTS OR IMPORTANT FEDERAL ISSUES JUSTIFYING REVIEW

Morales recognized that Section 1305 did not shield airlines from all state law claims based on their wrongdoing. Rejecting any bright-line rule, the *Morales* Court provided lower courts with the analytical framework to determine whether the facts in each case showed a sufficient relation to airline rates, routes and services to be pre-empted.

The Illinois Supreme Court faithfully applied the *Morales* framework to the facts here. Thus, to accept certiorari on this case would mean to reexamine the carefully considered – and recent – ruling in *Morales*. Just last month, the Court rejected an opportunity to revisit *Morales* in *West v. Northwest Airlines*, 995 F.2d 148 (9th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3551 (1994), a case in which the Ninth Circuit, applying *Morales*, found that Section 1305 did not pre-empt a state law claim for compensatory damages based on bumping.

Contrary to American's claim, the decision of the Illinois Supreme Court does not conflict with the Seventh Circuit decisions in *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 603 (1993) or *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 114 S. Ct. 1948 (1990). Neither of these cases dealt with frequent flyer

programs. Moreover, *Statland* involved a challenge to American's ticket refund policies. The Seventh Circuit found pre-emption based on the "obvious" close connection between the amount of ticket refunds and the rates charged for the ticket – a relationship that is not present here. *Illinois Corporate Travel*, which was decided before *Morales*, involved advertising of airline ticket rates, again a situation where the claims obviously related to rates.

Nor does the Illinois Supreme Court ruling conflict with post-*Morales* cases from other circuits. American claims that *Wolens* conflicts with three cases from the Ninth and Fifth Circuits. But none of these cases address pre-emption with respect to frequent flyer programs. The Ninth Circuit cases – *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992), and *West*, 995 F.2d 148 – each considered pre-emption in the same way *Wolens* did, evaluating whether their particular claims and facts were sufficiently connected to airline rates, routes and services to be pre-empted. The Fifth Circuit case, *Hodges v. Delta Airlines*, 4 F.3d 350 (5th Cir. 1993), *petition for reh'g en banc granted*, 12 F.3d 426 (5th Cir. 1994), is currently being reheard *en banc* by the Fifth Circuit after the original panel urged that earlier Fifth Circuit law was wrong and that Section 1305 should not pre-empt the claims in that case. The Fifth Circuit's analysis in *Hodges* is consistent with the *Wolens* analysis.

Finally, the decision below does not raise any important question of federal law requiring this Court's review and resolution. American's purported conflict between *Wolens* and Department of Transportation ("DOT") interpretations of the ADA is a ruse. Tracking the language of

Section 1305, DOT concluded that general state law may apply to frequent flyer programs unless the claims relate to airline rates, routes and services. DOT has chosen not to closely regulate frequent flyer programs, leaving it to the judiciary to apply this Court's guidelines in *Morales* in determining whether Section 1305 pre-empts claims based on frequent flyer programs.

American's assertion that allowing this case to proceed "will force all national airlines to conform their nationwide practices to the particular strictures of Illinois law" says only that allowing the claims means American cannot breach its contracts or defraud consumers with impunity. That result certainly does not diverge from federal law or the laws of any other state.

Even if this Honorable Court agrees that this case requires review, it should summarily reject American's statement of the issues. Both issues are misstated in that they fail to express the factual underpinnings for the decision – facts which *Morales* dictates the lower courts should review. Moreover, American takes the word "essential" in the Illinois Supreme Court opinion out of context, fabricates a standard out of it, and then asks this Court to reject the standard.

I. THE ILLINOIS SUPREME COURT'S DECISION IS CONSISTENT WITH *MORALES*.

A. The Illinois Supreme Court Correctly Followed The Analysis Which This Court Prescribed In *Morales*.

1. *Morales* Recognizes Limits To The Scope Of Pre-emption Under Section 1305.

In *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), this Court analyzed pre-emption under Section

1305 with respect to a narrow issue. The question was whether state attorneys general could enforce specific prosecutorial guidelines adopted by the National Association of Attorneys General ("NAAG") regulating the advertising of airline rates. The Court interpreted Section 1305 to pre-empt "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services'. . . . " *Id.* at 2037. This Court found that the NAAG guidelines "obviously" relate to rates since they "establish binding requirements as to how tickets may be marketed if they are to be sold at a given price." *Id.* at 2039. The *Morales* Court stressed that the guidelines would not simply prevent "market distortion caused by 'false' advertising," but would actually limit air carriers' "ability to communicate fares to their customers." *Id.* at 2040.

Significantly, the Court in *Morales* acknowledged limits to pre-emption under Section 1305, observing that " 'some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* (*quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983).[4] As an example, the Court stated that Section 1305 does not necessarily pre-empt

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[4] In *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), decided after *Morales*, the Court reaffirmed the basic principle that there is a "presumption against the pre-emption of state police power regulations." *Id.* at 2618. This presumption against pre-emption is applicable to traditional state claims, such as the garden-variety breach of contract and consumer fraud claims asserted by plaintiffs. *See, e.g., California v. ARC American Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, *reh'g denied*, 374 U.S. 858 (1963).

regulation of non-price aspects of fare advertising. *Id.* The Court declined to establish a bright-line rule for distinguishing between claims which are pre-empted and those which are not pre-empted, writing: " 'The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.' " *Id.* (*quoting Shaw*, 463 U.S. at 100 n.21).

Morales also recognized the continuing vitality of the statutory savings clause which provides: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506. The Court held that if the state claim or regulation did not have a sufficient relationship to an airline's rates, routes, or services, it would be saved by Section 1506. *Morales*, 112 S. Ct. at 2037.

American would have this Court find that Section 1305 shields air carriers from all state law claims that have any arguable connection to rates, routes or services. But *Morales* rejected that result and American has provided no reason for the Court to reconsider *Morales*. By declining to establish a bright-line rule, the Court in *Morales* determined that lower courts must evaluate whether specific claims are pre-empted. That evaluation – based on *Morales'* holding that claims tenuous, remote or peripheral to rates, routes and services are not pre-empted – necessarily requires the lower court to evaluate the specific facts in each case. Thus, the *Morales* Court established an analytical framework to evaluate pre-emption, not a hard rule to be applied indiscriminately.

Where the lower court applies *Morales'* analytical framework to facts not considered in *Morales*, its ruling will be consistent with *Morales*.

2. The Illinois Supreme Court's Fact-Specific Inquiry Complies With The Analysis Approved In *Morales*.

Despite the "spin" which American places on the decision of the Illinois Supreme Court, the lower court's pre-emption analysis is fully consistent with *Morales*. The Illinois Supreme Court held that plaintiffs' ordinary state claims for money damages have only a "tangential" relation to American's rates, routes and services. App. at 7a. Thus, the court concluded that Section 1305 did not pre-empt plaintiffs' claims for money damages. *Id.*

To reach this result, the court closely followed *Morales'* analytical framework. App. at 7a. First, the court considered the nature of the contract that American breached and the wrongdoing complained of. The court described the claims, recounting plaintiffs' contention that American retroactively changed the AAdvantage Program so as to diminish the value of AAdvantage club members' previously-earned credits. The court also noted plaintiffs' contention that the AAdvantage Program was developed and utilized as a marketing device. Next, the court considered whether the claims were tenuous, remote, or peripheral to airline rates, routes and services. As part of that analysis, the court found that plaintiffs' damage claims did not seek to establish the rates that airlines must charge, to determine the routes that airlines must fly, or to dictate the services that airlines must

provide. App. at 6a. The court also noted that frequent flyer programs are "not an essential element to the operation of an airline," finding that "the airline industry functioned successfully for decades" without frequent flyer programs. App. at 6a.

The court specifically referred back to its previous holding that plaintiffs' claims for money damages bore only a "tangential" relation to airline rates, routes and services. It noted that the dictionary definition of "tangential" includes the word "tenuous", one of the *Morales* standards for non-pre-empted claims. The court concluded again that the claims bore only a tangential relation to airline rates, routes and services, and found that Section 1305 did not pre-empt the claims, in accordance with *Morales*. App. at 6a-7a.

3. The Illinois Supreme Court Did Not Limit Pre-emption To State Law Claims That Relate To "Essential" Airline Operations.

The Illinois Supreme Court characterized the AAdvantage Program as not "essential" to airline operations. In so describing the Program, the court did not put forward a new legal standard for pre-emption as American repeatedly suggests. Rather, it considered whether the Program was essential to airline rates, routes and services as a factor in applying *Morales* to the facts. It was a reasonable factor to evaluate. Since it is likely that an "essential" service is not tenuous, remote or peripheral to airline services, it is completely consistent with *Morales* to evaluate whether a particular service is "essential" to

assist the court in determining whether a particular factual claim is "tenuous", "remote" or "peripheral" under the *Morales* guidelines.[5]

B. The Result In *Wolens* Does Not Conflict With The Result In *Morales*.

In *Morales*, the Court was presented with the question of whether Section 1305 pre-empted specific prosecutorial guidelines which directly regulated the manner in which airlines advertised rates. The Court noted that Section 1305 was designed "[t]o ensure that the States would not undo federal deregulation with regulation of their own. . . . " *Id.*, 112 S. Ct. at 2034. The Court determined that prosecutorial enforcement of the NAAG fare advertising regulations would impose regulations closely relating to airline "rates", and could undo federal deregulation. *Id.* at 2039-40.

In stark contrast with the proposed fare advertising regulations at issue in *Morales*, plaintiffs' garden-variety damage claims, if permitted to proceed, will not "undo federal deregulation." Plaintiffs do not seek to impose any restrictions on American's air transportation business. They seek only money damages for American's fraud and for breach of the contractual obligations which American voluntarily assumed in operating the AAdvantage club. A damage award will not compel American to

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[5] Ironically, American has no quarrel with the Ninth Circuit's evaluation of whether ground transportation was "essential" to Federal Express' services in *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992). *See infra* at 20-21.

change or advertise its rates in any manner. Nor will monetary relief for American's wrongful conduct alter American's airline services. A damage award will not affect who is transported on American, when they are transported, where they are transported, or the circumstances under which they are transported.

American's assertion that, if successful, plaintiffs' claims will require American to follow the NAAG frequent flyer guidelines is a transparent attempt to fabricate a similarity between this case and *Morales*. *Morales* addressed only the NAAG fare advertising guidelines – not the NAAG frequent flyer guidelines. Further, the state attorneys general in *Morales* sought specifically to enforce the fare advertising guidelines. Plaintiffs here do not wish to enforce the NAAG frequent flyer guidelines; they seek only to obtain monetary relief for American's wrongdoing.

Contrary to American's argument, *Morales* does not address – much less foreclose – any distinction between damage claims and claims for injunctive relief. Under *Morales*, the Court gave lower courts the analytical framework to evaluate any type of claim. Moreover, the propriety of the Illinois Supreme Court's decision that plaintiffs' injunctive claims are pre-empted is not at issue. Plaintiffs have not appealed that decision. Nor, obviously, has American, which prevailed on that point below.[6]

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[6] Notwithstanding this Court's statement in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), that regulation can be exerted through a damage award as well as through preventive relief, this Court has declined on several recent occasions to find the regulatory effects of state law direct or substantial enough to justify pre-emption. *See Cipollone*, 112 S. Ct. at 2628 (Blackmun, concurring). *See, e.g., English v. General Electric Co.*, 496 U.S. 72, 85 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional [state workers' compensation] award provision") (*citing Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256, *reh'g denied*, 465 U.S. 1074 (1984)). With respect to plaintiffs' breach of contract claim, the regulatory effect of state law is not even at issue. As Justice Stevens noted in *Cipollone*, "a contractual requirement, although only enforceable under state law, is not 'imposed' by the state, but rather is 'imposed' by the contracting party itself." 112 S. Ct. at 2622 n. 24. American's quotation from *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) does not counter the principle that distinct remedies may have differing levels of regulatory effect, with different results in pre-emption analysis. The quote from *Ouellette* was dicta; the Court's holding was based on the specific facts of the case.

II. THE *WOLENS* DECISION DOES NOT CONFLICT WITH ANY POST-*MORALES* CASES.

Just as American invented the specious issue that Illinois created a new legal standard based on the word "essential", so it has manufactured specious claims of conflict between *Wolens* and cases from circuit courts of appeals.

A. The Cases Relied On By American Do Not Address Federal Pre-emption With Respect To Frequent Flyer Programs, Thus Those Cases Do Not Conflict With *Wolens*.

As *Morales* was decided less than two years ago, it should not be surprising that there are a relatively small

number of Section 1305 pre-emption cases applying *Morales*. Of the post-*Morales* state high court and federal appeals court cases, *Wolens* is the only one to determine whether claims based on frequent flyer programs are pre-empted.[7] Because *Morales* prescribed a factual analysis to determine whether a claim is pre-empted, there is no potential for conflict between a decision based on frequent flyer programs and those based on other facts.

B. *Wolens* Does Not Conflict With Other Cases Either In Approach Or In Result.

1. The post-*Morales* cases generally follow the same approach as *Wolens*.

Numerous federal courts interpreting Section 1305 since *Morales* have found that Section 1305 does not pre-empt all state claims. These cases, just like *Wolens*, applied the analysis of *Morales* to their unique facts. And the facts in these cases, like the facts here, involved claims that were so remote from airlines' rates, routes and services that they were not pre-empted. *See, e.g., West v. Northwest Airlines, Inc.*, 995 F.2d 148, 151 (9th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3551 (1994) (claim for compensatory damages based on bumping was only tenuously connected to airline services and therefore was not pre-

[7] The only lower court case cited by American which refers to frequent flyer programs is *Schaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D.Cal. Sept. 18, 1992). The *Schaefer* court allotted a mere two paragraphs to the pre-emption issue, and dismissed plaintiff's claim, based on numerous pleading defects, not only pre-emption. Moreover, unlike this case, *Schaefer* involved claims regarding misleading advertising.

empted); *Chouest v. American Airlines, Inc.*, 839 F. Supp. 412 (E.D.La. 1993) (state law claims arising from plaintiff's injuries incurred during ground transportation provided in American vacation package were not pre-empted under *Morales* because ground transportation was ancillary to American's airline services).[8]

2. *Wolens* does not conflict with the federal appellate court decisions cited by American.

The *Wolens* decision does not conflict with the Seventh Circuit's decision in *Statland v. American Airlines, Inc.*, 998 F.2d 539 (7th Cir.), *cert. denied*, 114 S. Ct. 603 (1993). That case involved American's policy toward cancelled ticket refunds: the amount of the rate charged by American which would be refunded if the customer cancelled the flight ticket. With no analysis, the court found it obvious that a case relating to ticket pricing was sufficiently related to airline rates as to be pre-empted.

In the Petition, American argues that the Seventh Circuit in *Statland* decided the general issue of whether

[8] *See also Public Health Trust v. Lake Aircraft, Inc.*, 992 F.2d 291 (11th Cir. 1993) (despite federal design standards, common law claims regarding defective design of aircraft seat were not pre-empted); *Cleveland v. Piper Aircraft Corp.*, 985 F.2d 1438 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 291 (1993) (same); *Stewart v. American Airlines, Inc.*, 776 F. Supp. 1194, 1197-98 (S.D.Tex. 1991) (claims for injuries occurring during flight were not pre-empted); *Bayne v. Adventure Tours USA*, 1994 U.S.Dist. LEXIS 413 (N.D.Tex. Jan. 13, 1994) (state law claims from airline employees' misrepresentations to police about plaintiff's actions during flight were not pre-empted).

damage claims under the Consumer Fraud Act and contract law were pre-empted. But in its Brief In Opposition To Petition For Writ Of Certiorari in *Statland*, American provided a more honest appraisal of the issue: whether the Court should review a decision that the plaintiff's state law claims arising out of partial refunds for discounted and restricted air travel tickets are pre-empted, Opp. App. at 9a, 10a. In that brief, American highlighted the very facts that distinguish this case from that one: "Statland's case involves the actual collection and refund of the fare itself, presenting an even closer connection to airline rates, and a clearer case for pre-emption, than *Morales*." Opp. App. at 18a. This case, by contrast, has nothing to do with the actual collection or refund of the fare for air travel services. Thus, *Wolens* and *Statland* are not in conflict. Both cases applied *Morales'* factual approach; their factual differences justified different results with respect to pre-emption.[9]

American's effort to create a conflict between the decision below and the Seventh Circuit's decision in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990), is futile. In *Illinois Corporate Travel*, the court held that federal law pre-empted a travel agency's state law claims relating to limits on price advertising since price advertising clearly related to American's rates. *Id.* at 754. Contrary to American's argument, *Illinois Corporate Travel*

[9] Contrary to American's disingenuous argument and misquotes of *Statland* (Petition at 25), that case never addressed the question of the form of relief. Thus, *Statland* does not conflict with *Wolens* on that issue.

does *not* hold that all state law contract or Consumer Fraud Act claims are pre-empted by Section 1305. Indeed, the court declined to express an opinion on whether Section 1305 would pre-empt state law claims to remedy other wrongdoing. *Id.* at 754-55. Since this case involved facts completely distinct from those in *Illinois Corporate Travel*, the purported conflict between the two decisions is imaginary.

American's claim of a conflict between this case and *Hodges v. Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993), *petition for reh'g en banc granted*, 12 F.3d 426 (5th Cir. 1993), is curious. While *Hodges* found that a tort claim for physical injury was pre-empted by Section 1305 based on a previous unpublished opinion, the Fifth Circuit stressed that it believed the unpublished opinion was wrong and urged *en banc* review, which is pending. Thus, there is good reason to believe that *Hodges* will be reversed. In any event, *Hodges* is not settled and provides no basis for asserting a conflict justifying review.

Equally important, the *Hodges* court's analysis in attacking the unpublished opinion supports *Wolens*. In particular, *Hodges'* careful analysis of the ADA resulted in its conclusion that "the nature of the 'services' preempted by Section 1305(a) is more narrow than might at first be supposed." *Id.* at 353.

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. . . . Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink,

> and baggage handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these features of air transportation that we believe Congress intended to deregulate as "services" and broadly to protect from state regulation.

Id. at 354. The *Hodges* court explained that this definition of services was consistent with Congressional intent regarding Section 1305 as well as with the Civil Aeronautic Board's understanding of the ADA. *Id.* at 354-55. *See, e.g.*, Civil Aeronautics Board, Statement of General Policy, Implementation of Preemption Provisions of the Airline Deregulation Act of 1978, 44 Fed. Reg. 9948, 9951 (Feb. 15, 1979). *See also Stewart*, 776 F. Supp. at 1197. *Hodges* concluded that claims involving an airline's business separate from its basic flight services were peripheral to airline services and should not be pre-empted by Section 1305.[10]

Nor does this decision conflict with *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2956 (1992). In *Federal Express*, decided before *Morales*, the court determined that regulations affecting the services of Federal

[10] American deceptively quotes from *Hodges*. Taking a phrase out of context, American argues that *Hodges* held that Section 1305 pre-empts all state claims relating to "the contractual arrangement between the airline and the user of the service." Petition at 23. But American omits the context of this quote showing that the "contractual arrangement" and "services" which *Hodges* referred to were the contract and service of airline travel.

Express' trucks were pre-empted. The case did not evaluate frequent flyer clubs, and it made no general rulings as to what kinds of airline services lead to pre-emption. American argues that if the Ninth Circuit applied the same approach used in *Wolens* it would have found no pre-emption since, according to American, "the ground transportation services of an air express delivery service are not essential elements of airline operations." But the Ninth Circuit found just the opposite, concluding that the ground transportation services *were* essential to Federal Express' operations. *Id.* at 1079. Far from presenting a conflict with *Wolens*, *Federal Express* supports *Wolens'* consideration of whether services are essential to an airline as a factor in determining pre-emption.

Finally, American's contention that the Illinois Supreme Court's decision conflicts with the Ninth Circuit's holding in *West* that punitive damages were pre-empted is a "red herring." The Illinois Supreme Court's decision does not address punitive damages, and the issue was not briefed by the parties below.

III. THE ILLINOIS SUPREME COURT'S RULING DOES NOT CONFLICT WITH DOT INTERPRETATIONS OF SECTION 1305.

American contorts the pronouncements of the Department of Transportation ("DOT") to manufacture a purported conflict between DOT and the decision in *Wolens*. In fact, DOT's ruling in *Complaint and Rulemaking Petition of Association of Discount Travel Brokers*, Docket Nos. 46280, 47539 (DOT Order May 29, 1992) is fully consistent with *Wolens* and the airlines' arguments in that

matter support plaintiffs' position here. The Association of Discount Travel Brokers, whose members purchase and sell frequent flyer awards, sought to require DOT to establish nationwide standards for frequent flyer programs. App. at 90a-91a. In opposing the proposed rulemaking, American argued, among other things, that DOT lacked jurisdiction to regulate frequent flyer programs since those programs extend beyond airlines. App. at 92a-93a.

Further, the airlines stressed that their agreements with members of their frequent flyer programs, which prohibit the purchase and sale of frequent flyer awards, were "valid and enforceable contractual restrictions on assignment. . . ." App. at 91a. They described their frequent flyer programs as "legitimate contract[s]" governed "solely by contract law." App. at 89a. DOT agreed:

> Continental correctly describes the relationship between frequent flyer programs and their members as a *contract* in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.

App. at 96a (emphasis added).

Contrary to American's argument, DOT did not conclude that an air carrier can breach its contractual obligations without being held liable for money damages under state law. DOT's statement that certain methods of controlling the cost of frequent flyer programs may be legitimate is not inconsistent with *Wolens*. Plaintiffs do not argue – and the *Wolens* decision did not find – that

airlines' methods for controlling costs are per se illegitimate. Plaintiffs do argue – and the *Wolens* court agreed – that if American's institution of cost controls breaches a contract, American can be held liable for damages under state law. Nothing in the DOT order contradicts this finding.

American relies on a quotation from the DOT order, which it describes as an "interpretation of the preemptive scope of Section 1305". Petition at 28. In fact, DOT's statement mirrors the "relating to rates, routes and services" language of Section 1305; DOT does not interpret it. *See* App. 102a. It is left to lower courts to determine whether state law claims relate to rates, routes or services under *Morales*.

A finding of pre-emption would leave members of the AAdvantage Program with no remedy whatsoever, state or federal, for American's breach of contract.[11] Accepting American's argument that plaintiffs' damage claims are pre-empted would give air carriers *carte blanche* to breach any contract to which they are parties – whether it is a contract with a supplier of aircraft parts or a contract with members of a frequent flyers club. Such an absurd result is not mandated by Section 1305.

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[11] Federal common law is an unlikely source of recovery. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25, 28-33 (1977) (holding that federal common law did not apply to contract dispute between county and Federal Aviation Administration).

IV. THE DECISION OF THE ILLINOIS SUPREME COURT DOES NOT RAISE ANY IMPORTANT FEDERAL QUESTION WHICH WARRANTS REVIEW BY THIS COURT.

Whether some courts are struggling with how to apply *Morales'* analytical framework for pre-emption, as American contends, is irrelevant. Only when such struggles result in irreconcilable conflicts or create unusual pivotal points of federal law is plenary review called for.

The conclusion by the court below that Section 1305 does not pre-empt plaintiffs' state law breach of contract and consumer fraud damage claims was the result of a fact-sensitive analysis as required by *Morales*. The individualized nature of the inquiry indicates that it will not have far-reaching ramifications for other cases. The purported conflicts with United States Courts of Appeal and with DOT are illusory, as explained *supra*. Thus, the *Wolens* decision presents neither an irreconcilable conflict nor a pivotal point of federal law. Plenary review is not justified.[12]

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[12] American argues that the Court should review this decision because allowing it to stand could subject American to other suits by frequent flyers in Illinois and other states, with severe economic consequences to American. Virtually every person charged with damage liability could make that argument, but it would not justify review. American tries to set the airline industry apart, implying that the industry is so important that the Court should protect it from damage claims based on its own breach of contract and fraud. If every "important" industry in this country were protected from damage suits, the law of contract would be obliterated.

Ironically, in its Petition, American extols the market virtues of deregulation. *See* Petition at 3, 14, 16. And in the DOT proceeding, American contended that "market forces are in a better position than the Department to correct any perceived abuses in the frequent flyer program." App. at 93a. Yet, American's transparent goal here is to avoid the market consequences of its actions. The free market economy has long included the principle that those who breach contracts or defraud others will be liable for damages. American presents no evidence that Congress, in adopting Section 1305, intended to eviscerate the checks and balances of the free market.

It is telling that the airlines, including American, have often brought state law claims against coupon brokers for breach of contract based on their purchase and resale of frequent flyer program credits. *See American Airlines v. Christensen*, 967 F.2d 410, 412 (10th Cir. 1992); *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 689 (9th Cir. 1990); *American Airlines, Inc. v. American Coupon Exchange, Inc.*, 721 F. Supp. 61, 62 (S.D.N.Y. 1989). Evidently, American is willing to invoke state law breach of contract remedies when it wants to enforce the terms of the AAdvantage Program, but seeks to evade state law when members want to enforce the Program's terms.[13]

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[13] American complains that it will have to abide by Illinois law if plaintiffs' damage claims stand. This is only appropriate since American breached contracts with and defrauded Illinois residents. Moreover, Illinois contract and fraud law does not differ significantly from other states' comparable laws, and the Illinois courts may determine the claims of non-resident class members. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

V. AMERICAN'S STATEMENT OF ISSUES IS IMPROPER.

American identifies two issues as the questions on appeal should the Court grant the Petition. The questions as framed by American would take the Court far beyond the Illinois Supreme Court's ruling. The Court should not take on appeal issues "not pressed or passed upon in the state court." *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

American frames the first issue as whether Section 1305 "preempt[s] only those state law claims that relate to 'essential' airline operations". Petition at (i). But *Wolens* made no such general ruling on the operation of Section 1305. Nor did it create a litmus test for pre-emption claims based on the term "essential." *See supra* at 11-13. American's second purported issue attempts to put in question another issue not decided by the lower court. Framing the question very generally, American asks whether Section 1305 pre-emption depends on the form of relief requested. This question, like the first one, was not addressed by the Illinois Supreme Court. Moreover, to rule on that issue, the court would have had to go far beyond the instructions of this Court on remand. *See Kotler v. American Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992)

American's argument that Illinois is establishing national standards and imposing its regulations on other states, in violation of the Commerce Clause, is wrong. This is a private civil suit, not a government regulatory action, and no injunctive relief will be awarded. The state of Illinois will not impose any regulations, let alone national regulations, on the airlines. *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), relied on by American, involved a statute that discriminated against interstate commerce; the case has no application here.

(on remand, court should confine inquiry to matters within specific scope of remand).

If the Court grants certiorari in this case, the only proper issue presented will be one based on the Illinois Supreme Court's actual ruling: Did the Illinois Supreme Court correctly apply the *Morales* test in determining that Section 1305 does not pre-empt state law claims arising out of American's breach of contract and fraud in connection with its AAdvantage marketing club, because the claims based on the AAdvantage club are too tenuous, remote or peripheral to airline rates, routes and services to warrant pre-emption?

CONCLUSION

For all the reasons set forth above, the Petition for Certiorari filed by American Airlines, Inc. should be denied.

Respectfully submitted,

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March 10, 1994

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

WOLENS, et al., Plaintiffs, v.
AMERICAN AIRLINES, INC.,
Defendant

No. 88 C 8158

[October 24, 1988, Decided; October 25, 1988, Filed]

JOHN A. NORDBERG, UNITED STATES DISTRICT JUDGE

Plaintiffs' state class action complaint alleged that changes instituted in defendant's "American AAdvantage" frequent flyer program constituted a breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. Ann. ch. 121½ para. 261 *et seq.* (Smith-Hurd Supp. 1988). Defendant removed to this Court from the Circuit Court of Cook County on the grounds that the complaint raised a federal question exclusively committed to the adjudication of the federal courts pursuant to § 105(a)(1) of the Federal Aviation Act (FAA), 49 U.S.C. § 1305(a)(1), and thus the case arose under federal law. *See* 28 U.S.C. §§ 1331, 1441(b).

Plaintiffs duly moved to remand with costs and attorneys fees for improvident removal. The Court now grants their motion for remand and for costs.

In opposing remand, defendants primarily argue that the case was properly removed under the doctrine of complete preemtion [sic] and attempt to demonstrate to the Court that the FAA indeed preempts the state claims.

Their arguments are not persuasive and fail under the analysis dictated by controlling precedent. *See Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S. Ct. 1542 (1987).

Few requirements of federal jurisdiction are more firmly established than the well-pleaded complaint rule, which holds that "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Id.* at 1546. Since federal preemption generally constitutes a defense to a claim, it does not arise on the face of the complaint and consequently does not permit removal. *Id.* After all, the defendant can make its preemption defense just as easily to the state court as it can to the federal court.

One preemption-related qualification to the well-pleaded complaint rule, however, results when Congress has so completely preempted an area that any complaint concerning it "is necessarily federal in character." *Id.* In such cases, preemption is not properly viewed as a defense because any claim regarding the preempted subject matter is automatically deemed federal, and thus the complaint itself raises an issue of federal law.

But in deciding whether a claim is necessarily federal in character, a court is not to employ the ordinary preemption analysis that determines whether federal law preempts state law. That would be reaching the merits before determining the court had jurisdiction to act. *Cf. Kanzelberger v. Kanzelberger*, 782 F.2d 774, 776-77 (7th Cir. 1986). Instead, what a court must determine is whether Congress intended to make any action concerning the federally governed area an action arising under federal

law, even if the plaintiff's well-pleaded complaint raises only state-law claims. As the Supreme Court explained in *Metropolitan* with respect to the Employee Retirement Income Security Act (ERISA):

> [T]he touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress. Indeed, as we have noted, even an 'obvious' pre-emption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of [ERISA] § 502(a) removable to federal court. Since we have found [plaintiff's] cause of action to be within the scope of § 502(a), we must honor that intent whether pre-emption was obvious or not at the time this suit was filed.

107 S. Ct. at 1548. As the quoted passage indicates, the party urging *Metropolitan* preemption must demonstrate congressional intent to make any claims falling within the scope of the federal statute *removable* to federal court. Justice Brennan emphasized this point in concurrence: "In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court." *Id.* (emphasis in original).

In the instant case, defendant has pointed to no legislative history indicating a congressional intent to make any claim arguably falling within the scope of the FAA removable to federal court. Instead, defendant has pointed to the "sweeping" preemption provision of 49 U.S.C. § 1305(a)(1), which provides that "no State or political subdivision thereof and no interstate agency or

other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *See also* 49 U.S.C. §§ 1302(a)(7), 1381(a). The only legislative history it has cited is a House report related to the Civil Aeronautics Board Sunset Act of 1984. The report notes:

> In addition to protecting consumers, federal regulation ensures a uniform system of regulation and pre-empts regulation by the states. If there was no federal regulation, the states might begin to regulate these areas, and the regulations would vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4 (May 21, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2857, 2860.

Whatever relevance the statute and legislative history have to the question whether the FAA creates a preemption defense to plaintiffs' state contract and fraud claims, they in no way indicate a congressional intent to convert these state claims into federal actions removable to federal court. Furthermore, defendant has cited no case holding that Congress intended the FAA to have that effect. In fact, as far as the Court can tell from the parties' submissions, the only areas in which Congress has been found to have intended this conversion of state law claims involve disputes preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and by

ERISA, 29 U.S.C. § 1001 *et seq. See Metropolitan; Avco Corp. v. Machinists,* 390 U.S. 557 (1968).[1]

Moreover, the legislative history relied upon by the Supreme Court in finding intent for complete preemption with regard to ERISA stands in sharp contrast to the report cited by defendant in this case. The ERISA report stated:

> [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*

Metropolitan, 107 S. Ct. at 1547 (quoting H.R. Conf. Rep. No. 93-1280, at 327 (1974) (emphasis in original). As discussed in the text above, this report indicates an intent to make any claim falling within the subject matter of the relevant statutory provisions a claim arising under federal law, and thus removable. The legislative report cited

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[1] Defendant contends that "[t]he Supreme Court's recent decisions . . . confirm . . . that the complete pre-emption doctrine is no longer limited to labor cases." Defendant's Response, at 13 n.8. That is true. The doctrine now extends to ERISA cases. *See also Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) (state law complaint alleging right to possession of Indian lands necessarily arises under federal law). But defendant has cited no case outside these narrow areas in which the complete pre-emption doctrine has been held applicable.

by defendant, by contrast, merely states the obvious – federal regulation preempts state regulation.

Furthermore, the Court notes that the plain language of the FAA even cuts against defendant's contention that the act gives rise to a general preemption defense. *See* 49 U.S.C. § 1506 ("Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.") *See also Nader v. Allegheny Airlines,* 426 U.S. 290 (1976) (common law fraudulent misrepresentation action against airline should not be stayed pending Civil Aeronautics Board determination of whether overbooking is deceptive under FAA § 411); *Wolsi v. American Airlines, Inc.,* 668 F. Supp. 1117 (N.D. Ill. 1987) (section 1305 does not preclude state courts from hearing breach of contract actions against airlines). While it is not wholly inconceivable that defendant can make out a preemption defense to defeat plaintiffs' claims on the merits in the state court,[2] it cannot plead preemption to remove to this Court.

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[2] Actually, defendant's preemption argument appears to face an uphill struggle in the state courts. Plaintiffs have cited a pending state court case in which another airline, represented by defendant's counsel here and facing a challenge to its flight promotion program, unsuccessfully moved to dismiss the part of the state law complaint based upon the Illinois consumer protection act on grounds of FAA preemption. *Sherman et al. v. Northwest Airlines, Inc.,* No. 87 CH 9010 (Cook County Circuit Court March 31, 1988). The *Sherman* case, like this case, also contains a breach of contract count. Plaintiffs report that three other such cases also are pending in Circuit Court of Cook County. *Rivkin v. Northwestern Airlines, Inc.,* No. 88 CH 2637; *Ryan v. Delta Airlines,* No. 88 CH 4846; *Zabka v. United Airlines,*

Defendant does, however, make two slightly different arguments in an attempt to keep this case in federal court. The first of these arguments is that plaintiffs somehow "artfully pleaded" a federally based claim in the guise of state contract and fraud claims. The sole authority that defendant cites for this argument is *Lingle v. Norge Division of Magic Chef, Inc.,* 823 F.2d 1031 (7th Cir. 1987) (en banc).

Initially, the Court admonishes defense counsel for citing authority without indicating that it has been reversed, as is true of *Lingle. See Lingle v. Norge Division of Magic Chef, Inc.,* ___ U.S ___, 108 S. Ct. 1877 (1988).[3] While a federal claim cannot masquerade as a state law claim through the expedient of artful pleading, the Court has carefully examined the complaint, and concludes that it only pleads what it purports to plead – state law contract and fraud claims. *See Saturday Evening Post Co. v. Rumbleseat Press, Inc.,* 816 F.2d 1191, 1194-95 (7th Cir. 1987).

Defendant's final argument is that plaintiffs' complaint may be removed because it arises under federal common law. This argument is largely a rehash of defendant's preemption argument.[4] In any event, defendant

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87 CH 3353. Plaintiffs inform the court that none of these cases has been removed to the Northern District of Illinois.

[3] If counsel's point was that the reversed case is still good law for the proposition for which it is cited, counsel should be advised that the proper citation form is "reversed on other grounds."

[4] *See* Defendant's Response, at 15 ("Most of the numerous reasons which compel the application of federal common law in

cites no case in which state contract and fraud claims against airlines have been held to be governed by federal common law. Given the extremely limited play the federal common law enjoys, *see Barany v. Buller*, 670 F.2d 726 (7th Cir. 1982), the Court finds that this apparent state law case is not actually governed by the federal common law.

Accordingly, for the foregoing reasons, this case is remanded to the Circuit Court of Cook County. Pursuant to 28 U.S.C. § 1447(c), the Court awards plaintiffs the costs of this action.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: October 24, 1988

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this case have been discussed in other contexts above and need not be repeated here."). Defendant then proceeds to argue once more that the FAA should preempt plaintiffs' state law action.

APPENDIX B

No. 93-604

In The

Supreme Court of the United States

October Term, 1993

IRIS STATLAND,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant a petition for a writ of *certiorari* to review the Seventh Circuit Court of Appeals' decision that Petitioner's state law claims, arising out of Respondent American Airlines' partial refunds for discounted and restricted air travel tickets, "relate to" airline rates and therefore are pre-empted by the Airline Deregulation Act.

RULE 29.1 STATEMENT

Respondent American Airlines, Inc. is wholly owned by AMR Corp., a Delaware Corporation, and owns 49% of DFW Terminal Corp., a Texas corporation.

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In The

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AMERICAN AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a dispute between an airline and a passenger regarding $1.25 that Petitioner Iris Statland claims should have been returned to her as part of a ticked refund. Statland purchased a discount ticket for air travel from Respondent American Airlines, Inc. ("American"). Statland paid $138.00, which included the federal aviation tax on airfares, for a round trip ticket from Chicago to New York. Statland knew that the ticket was subject to a 10% Service Charge upon cancellation. Statland cancelled her travel and sought a refund from American. American refunded $124.20 to Statland,

retaining $13.80 (10%) of the $138.00 ticket price as a Service Charge. Statland claims that because American's advertisements and other published notices did not explicitly disclose that its 10% cancellation penalty applied to the total ticket price, American was not entitled to withhold any portion of the tax component of the fare and an additional $1.25 should have been refunded.

On April 2, 1992, Statland filed a five-count complaint against American in the United States District Court for the Northern District of Illinois. The first count of Statland's complaint alleged that American violated Section 411(b) of the Federal Aviation Act ("Aviation Act"), 49 U.S.C. § 1381(b) (Supp. 1992), and regulations promulgated thereunder, because American allegedly did not provide sufficient notice that its cancellation penalties were based upon the total ticket price, including the tax component. Statland also asserted four counts arising under Illinois state law: breach of fiduciary duties (Count II); violation of Section 2 of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2 (1992) (Count III); conversion (Count IV); and breach of contract (Count V).

The district court reviewed the complaint and, *sua sponte*, dismissed the entire action on April 6, 1992. The district court held that no private right of action, express or implied, exists under Section 411(b) of the Aviation Act. With the sole basis of federal jurisdiction thus eliminated the district court declined to exercise supplemental jurisdiction and dismissed without prejudice the four state law claims. After unsuccessfully petitioning the district court for reconsideration of its

order of dismissal, on May 5, 1992, Statland filed a notice of appeal with the United States Court of Appeals for the Seventh Circuit.

On July 16, 1993, the Seventh Circuit affirmed the decision of the district court. The appellate court agreed that there is no private right of action under Section 411(b) of the Aviation Act, 49 U.S.C. § 1381(b), and Statland has not challenged that ruling in her Petition before this Court. After the district court had dismissed Statland's claim, but before the parties had filed their appellate court briefs, this Court issued its decision in *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031 (1992), holding that Section 1305(a)(1) of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 1305(a)(1) (Supp. 1992), broadly pre-empts all state law claims having any "connection with or reference to" an air carrier's "rates, routes, or services." The Seventh Circuit dismissed Statland's state law claims with prejudice, ruling that it is "obvious" that those claims are pre-empted by Section 1305(a)(1) of the ADA.

REASON FOR DENYING THE WRIT

The Decision of the Seventh Circuit below is a correct application of the Airline Deregulation Act's pre-emption provision, as recently explained by this Court in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992).

Section 1305(a)(1) of the ADA is a broad pre-emption provision, holding that no State

> shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . . .

49 U.S.C. § 1305(a)(1). The relevant issue below was whether Statland's claims "relat[e] to rates, routes, or services" of American.

The basic legal principles that control this case were the subject of detailed consideration by this Court last year in *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031 (1992). In *Morales*, this Court addressed the threatened enforcement by various state attorneys general of advertising guidelines promulgated under state consumer protection statutes. Significantly, the guidelines would have required airlines to include all taxes and surcharges within their advertised fares. 112 S. Ct. at 2039. This Court evaluated the advertising guidelines to determine whether they were pre-empted by Section 1305(a)(1) of the ADA. Relying upon ERISA decisions interpreting the same "relating to" language in that statute's pre-emption provision, 29 U.S.C. § 1144(a), this Court held that Section 1305(a)(1) is expansive in scope, and pre-empts any "State enforcement actions having a connection with or reference to airline 'rates, routes, or services.' " 112 S. Ct. at 2037. Applying those principles, this Court in *Morales* concluded that the advertising restrictions that the state attorneys general sought to impose had a clear connection with airline rates and were pre-empted.

In considering Statland's claims under Section 1305(a)(1) of the ADA, as interpreted by this Court in *Morales*, the Seventh Circuit correctly found Statland's

state law claims to be pre-empted by the ADA. Like *Morales*, this case challenges an airline's advertisements and other published notices of the terms and conditions of discount airfares. The four state law claims that Statland asserts against American all arise from American's alleged failure adequately to inform Statland of the conditions that applied to the discounted fare. Specifically, Statland complains that American's advertising and other notices misled her about the amount of the total ticket price that she would forfeit as a penalty if she canceled her flight. Statland's state law claims attempt to punish American for alleged wrongdoing in retaining money ($1.25) Statland paid for an air travel ticket; as the Seventh Circuit noted, "[w]e think it obvious that canceled ticket refunds relate to rates." (Petitioner's Appendix at App. 6.)

Statland seeks to avoid this "obvious" conclusion by suggesting that her state law claims relate not to the fares American charges for air travel, but to the aviation taxes imposed by the Federal government. (Petition at 4-5.) To support her position, Statland is forced to argue, without legal or logical support, that the "rate" charged by American is only the fare set by American, but that the federal taxes which are required by law to be assessed are not part of the "rate." Statland must stretch further to suggest that taxes on airline tickets do not even have a "connection with or reference to" airline rates. Those arguments are directly foreclosed by *Morales*, in which this Court concluded that disclosure of taxes and surcharges pertaining to advertised fares "relates to"

rates. The Seventh Circuit correctly held that Section 1305(a)(1) preempts Statland's state law claims.[1]

Having no plausible argument that the Seventh Circuit erred (Statland's Petition nowhere asserts that the appellate court's decision was erroneous), Statland attempts to justify this Court's attention by arguing that the decision below conflicts with the decision of the Ninth Circuit in *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993). Even if *West* is a dubious application of *Morales*, *certiorari* is not warranted here because the decision below falls squarely within the scope of *Morales*. Although *Morales* recognized that some "borderline" cases might arise at the margin under the "relating to rates, routes, or services" language of Section 1305(a)(1) of the ADA, Statland's case is nowhere near the margin. Indeed, where *Morales* involved the advertising of fares,

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[1] Indeed, the Seventh Circuit addressed the substance of Statland's state law claims precisely because they are so patently defective. The district court rejected Statland's claim under the Federal Aviation Act and declined to exercise supplemental jurisdiction over her state law claims. Subsequently, this Court issued its decision in *Morales*. The Seventh Circuit concluded that the existence of a clearly meritorious pre-emption defense, established by *Morales*, permitted the Seventh Circuit to exercise supplemental jurisdiction over, and dismiss, Statland's state law claims. *See DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 468 n.23 (7th Cir. 1990). This peculiar procedural posture means that, technically, the only issue properly before this Court is whether the Seventh Circuit abused its discretion by exercising supplemental jurisdiction, an issue not even addressed in Statland's Petition. Thus, even if the Court were to grant review, it is far from clear that the Court could resolve the question presented or that it could grant the relief Statland seeks.

Statland's case involves the actual collection and refund of the fare itself, presenting an even closer connection to airline rates, and a clearer case for pre-emption, than *Morales*. The decisions of other courts are of no moment where, as here, the conclusion that the Seventh Circuit reached is so obviously compelled by the language of Section 1305(a)(1) and *Morales*.

CONCLUSION

The Petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: November 15, 1993

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No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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REPLY TO BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY TO BRIEF IN OPPOSITION

The need for plenary review is clear. Respondents do not dispute that Illinois state courts have become the forum of choice for nationwide class actions challenging airline frequent flyer programs, as well as other airline practices. In addition to the five pending class actions noted in the petition (Pet. at 11 nn. 18-20), a sixth, challenging United Airlines' frequent flyer program, was filed just weeks ago.[1]

The pendency of these actions alone warrants immediate review. They involve tens of millions of potential plaintiffs and threaten to impose massive aggregate liabil-

[1] *Greenberg v. United Airlines*, No. 94 CH 499 (In the Circuit Court of Cook County, Illinois) (filed January 18, 1994). That nationwide class action, like this action, challenges capacity control restrictions and other modifications implemented in 1988. That action, like this action, seeks both compensatory and punitive damages for breach of contract and for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act.

ities on all of the nation's major airlines. Whether Section 1305 of the Airline Deregulation Act ("ADA") preempts such suits is at least as important a question as whether Section 1305 preempts state restrictions on airfare advertising—the issue on which review was granted in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). The Illinois Supreme Court's extraordinarily narrow interpretation of the preemptive scope of Section 1305 has effectively foreclosed the possibility of broader interpretations by other courts, because, as the number of cases already filed in Illinois state courts demonstrates, nationwide challenges to frequent flyer programs can and will be filed in Illinois. Thus, all airlines will be forced to conform their frequent flyer programs to Illinois' restrictive laws. As *Amicus* Air Transport Association (representing the nation's major airlines) has noted, if the Illinois Supreme Court's ruling stands, frequent flyer programs may have to be "radically modified or even terminated."[2] That will seriously impede airline competition, because, as respondents concede, frequent flyer programs are a major "marketing tool" that airlines use "to compete . . . for customers". Br. in Opp. at 4.

Review is all the more warranted because the Illinois Supreme Court's decision plainly conflicts with *Morales*, as well as decisions of the Seventh Circuit and other courts of appeals, and threatens to defeat the core objectives of the ADA. Despite respondents' efforts to cloud the issue, the Illinois Supreme Court declined to apply Section 1305 for two reasons, and two reasons only: (i) the court did not consider frequent flyer programs "essential" to airline operations; and (ii) a damage award, as

[2] *See* Motion for Leave to File Brief Amicus Curiae of Air Transport Association of America in Support of Petitioner, at (unnumbered) p. 3. As the accompanying brief notes, at 7, as a direct result of the decision below, all the major airlines "are under enormous pressure to operate their frequent flyer programs in accordance with the particular requirements of Illinois law and the NAAG Guidelines, to which Illinois is a signatory."

opposed to injunctive relief, would not directly regulate airline conduct. Both components of the Illinois Supreme Court's analysis restrict the scope of Section 1305 in ways that conflict directly with *Morales* and the rulings of appeals courts. The decision of the Illinois Supreme Court also thwarts Congress's central goal of encouraging innovative competition and "ensur[ing] that States would not undo federal deregulation with laws of their own." *Morales*, 112 S. Ct. at 2034.

A. The Decision Below Conflicts With Morales In A Way That Merits Immediate Review.

1. The linchpin of respondents' argument is that no ruling can conflict with *Morales* so long as "the lower court applies *Morales*' analytical framework to facts not considered in *Morales*." Br. in Opp. at 11. That argument is both irrelevant and wrong.

It is irrelevant because the Illinois Supreme Court did not apply "*Morales*' analytical framework." The critical flaw in respondents' argument is that respondents, like the Illinois court, entirely ignored what *Morales* described as the "key phrase" in Section 1305: "relating to." 112 S. Ct. at 1036. Drawing from precedents construing the cognate ERISA preemption provision, *Morales* made clear that Section 1305 has an "expansive sweep," is "conspicuous for its breadth," and preempts all state laws having a "connection with or reference to" airline rates, routes or services. *Id.* at 2037 (quotations omitted). Because Congress chose the broad "relating to" language, Section 1305 preempts state laws affecting rates, routes or services "even if the effect is only indirect." *Id.* at 2038.

Respondents seek to rehabilitate the Illinois Supreme Court's decision by diverting attention from this "key phrase," and focusing instead on *Morales*' dictum about the outer boundaries of Section 1305. *See* Br. in Opp. at 9-10, 11-12, 13-14. That gambit is hardly surprising, but whatever the scope of the dictum in *Morales*, the

Illinois Supreme Court's analysis cannot be reconciled with the holding in *Morales*.

2. The Illinois Supreme Court's focus on whether frequent flyer programs are "essential" to airline operations directly contradicts the holding of *Morales*. The proper question under *Morales* is whether the state law at issue "relates" to rates, routes or services. Many aspects of airline operations will "relate to" airline rates, routes or services, and thus be preempted under *Morales*, whether or not they are essential—as the Illinois Supreme Court recognized when it preempted respondents' claims for injunctive relief despite its belief that frequent flyer programs are not essential. Frequent flyer programs certainly "relate to" or have a "connection with" airline rates, routes or services. The essence of such programs is the purchase of air transportation (an airline's core "service"), for particular mileage credits ("rates"). Notwithstanding their attempt to run away from the allegations in their complaints, respondents simply cannot deny that their claims challenge the institution of capacity control restrictions limiting the number of seats available for passengers who wish to pay for travel with frequent flyer credits. Thus, their claims relate to the purchase of air transportation services even more directly than did the claims at issue in *Morales*.

3. The Illinois Supreme Court's focus on the form of relief sought by plaintiffs is also foreclosed by *Morales*. Notwithstanding Section 1305's undisputed application to all "laws" relating to rates, routes, or services, respondents contend that the Illinois Supreme Court properly afforded different treatment to damages and injunctive claims. Respondents specifically argue that preemption is inappropriate because a damages award—unlike an injunction—does not actually prescribe rates, routes or services. Br. in Opp. at 14. But this is precisely the analysis *rejected* in *Morales*. As this Court made clear, such an interpretation "reads the words 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States

to *regulate* rates, routes, and services." 112 S. Ct. at 2037-38 (emphasis in original).

4. Respondents are in any event wrong that this Court need not review any decision that purports to follow the "analytical framework" of *Morales*. That suggestion is implausible in light of this Court's experience with the cognate ERISA preemption provision. *See* Pet. at 19-20 & n.29. As that experience teaches, and as *Morales* itself indicated, 112 S. Ct. at 2040, any preemption provision that sweeps as broadly as does Section 1305 will require periodic clarification by this Court, particularly when it is applied in important new contexts. Review is warranted here for precisely this reason. Frequent flyer programs are central to airlines' efforts to compete for passengers. The pendency in Illinois of numerous nationwide class actions challenging frequent flyer programs—with more certain to follow—raises the specter of massive aggregate liabilities, and threatens drastic curtailment of such programs.

5. Additionally, respondents are wrong that application of Section 1305 would leave them without a remedy. As this Court made clear in *Morales*, "Section 1305 does not give the airlines *carte blanche* to lie and deceive consumers," because the DOT has ample authority to regulate misleading or deceptive practices of the kind respondents allege here. 112 S. Ct. at 2040. The congressional decision to vest DOT with authority in this area is appropriate because DOT "is equipped, as courts are not, to survey the field nationwide and to regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc. v. County of Kent, Michigan*, 114 S. Ct. 855, 863 (1994).

B. The Decision Below Conflicts With The Seventh Circuit And With Other Federal Courts.

1. Respondents dismiss all of the conflicts noted in the petition (Pet. at 18-26) with the incorrect and irrelevant observation that "The Cases Relied On By American Do Not Address Federal Pre-emption With Respect To Fre-

quent Flyer Programs." Br. in Opp. at 15; *id.* at 7, 16.[3] As we noted *supra*, it is unlikely there will be *additional* conflicts regarding frequent flyer programs because future challenges to such programs will be filed in Illinois. The fact that the decision below makes Illinois statutory and common law the *de facto* national standard for frequent flyer programs would thus be ample reason to grant certiorari even if that decision did not conflict with any other decision.

Furthermore, the decision below *does* conflict with other decisions, and those conflicts are much more important than mere conflicts between the *results* of two decisions involving identical facts. They are conflicts between the *tests* used by different courts to decide the scope of preemption under Section 1305, and those tests have been applied and will be applied regardless of the varying facts of individual cases. It is indisputable that application of the *test* used by Seventh Circuit, for example, would have produced a different *result* if applied to the facts of this case.[4]

2. Respondents' only answer to the plain conflict between the Ninth Circuit's decision in *West*,[5] which pre-

[3] The observation is incorrect because, as we noted in our petition (at 19), and as Justice McMorrow noted in her dissent (*see* Pet. App. 14a), there is a square conflict between the decision below and *Shaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D. Cal. Sept. 18, 1992), which preempted state consumer fraud and breach of contract claims seeking damages for alleged failure to provide adequate notice of changes in the terms of a frequent flyer program. The fact that preemption was not the "only" basis for dismissal in *Schaefer*, Br. in Opp. at 16, n.7, does not eliminate that conflict.

[4] The test used by the Seventh Circuit in *Statland v. American Airlines, Inc.*, 998 F.2d 539, *cert. denied*, 114 S. Ct. 603 (1993), and *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (1989), *cert. denied*, 495 U.S. 919 (1990), is discussed in the petition at 21-22, 24-25. Justice McMorrow noted in dissent that the result in this case would be different under the "rationale" used in *Statland*. Pet. App. at 14a, 16a.

[5] *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (1993), *cert. denied*, 62 U.S.L.W. 3551 (1994).

empted claims for punitive damages, and the decision below, which did not, is to describe that conflict as a "red herring" because the decision below does not separately "address" the claims for punitive damages. Br. in Opp. at 21. It is undisputed, however, that petitioner moved to dismiss the punitive claims on preemption grounds and that the Illinois Supreme Court denied that motion. Indeed, Justice McMorrow's dissent repeatedly stressed her disagreeement with the majority's decision to allow claims for "both actual and punitive damages" to proceed. Pet. App. at 11a; *id.* at 12a, 13a. There is thus a square conflict on this important point.

This case is a much stronger candidate for plenary review than was *West*. It raises the same conflict regarding the availability of punitive damages, and broader questions regarding the scope of Section 1305 as well. It directly affects *all* the major airlines and *millions* of class members, not just one overbooked passenger. And it does not depend on the interpretation of a particular federal regulation unique to overbooking. *See* Petition at 26.

3. Respondents continue to ignore the crucial fact that they alleged the *same* statutory and common law causes of action, based on the same facts, to support their claims for injunctive relief, which were preempted, *and* to support their claims for compensatory and punitive damages, which were not. Because preemption obviously turned on the form of relief requested, respondents are forced to argue that the test for preemption adopted in *Morales* permits courts to draw a "distinction between damage claims and claims for injunctive relief." Br. in Opp. at 14. But *Morales* noted that ERISA has been interpreted to preempt claims for damages, and held that Section 1305 should be interpreted to have the same scope. *See Morales*, 112 S. Ct. at 2039; Pet. at 15, and n.22. Thus, the decision below is flatly inconsistent with *Morales*.

Even if *Morales* had not made clear that preemption *under Section 1305* does not turn on the form of relief

requested, this Court made clear in *Cipollone, Garmon,* and *Ouellette*[6] that the form of relief is generally irrelevant to preemption analysis. Respondents rely on other cases, cited by the *dissent* in *Cipollone,* in which the Court held that the form of relief was relevant in light of the legislative history or the congressional intent underlying the particular federal laws at issue in those cases. Thus, if *Morales* does not settle the question under Section 1305, as we contend, then it is clearly important for the Court to decide whether Section 1305 is governed by the general rule, or falls within the exceptions to that rule.

4. Respondents argue that there is no conflict with *Hodges v. Delta Airlines, Inc.,* 4 F.3d 350 (5th Cir. 1993) because, in their view, "the *Hodges* court's analysis . . . supports *Wolens.*" Br. in Opp. at 19. This argument requires respondents to contend that petitioner "deceptively" described *Hodges* as preempting claims relating to "the contractual arrangement between the airline and the user of the service" at issue, Br. in Opp. at 20, because their complaints allege that the services at issue are part of the bargained for contractual arrangement between American and its frequent flyer members. But it is *respondents* who elide the relevant language from *their* quotation of *Hodges.* After quoting from *Hodges* to the effect that the type of "services" subject to preemption under Section 1305 will "generally represent a bargained-for or anticipated provision of labor from one party to another," Br. in Opp. at 19, respondents continue the quote but omit the very next sentence, in which the *Hodges* court said that "[i]f the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the *contractual arrangement* between the airline and the user of the services." 4 F.3d at 354 (emphasis added). Thus, there is clearly a conflict between the decision below and the *Hodges*

[6] *Cipollone v. Liggett Group, Inc.,* 112 S. Ct. 2608 (1992); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987); Pet., n.23.

court's analysis, because *Hodges* would clearly regard the air travel services provided to frequent flyers as part of the baragin or contractual arrangement between American and its frequent flyer users.[7]

5. Respondents argue that the "essential element" test used by the court below was only "a factor" in that court's analysis. Br. in Opp. at 12. Of course, the court below mentioned only two factors: "essentiality" and the relief requested. In any event, a test which incorporates "essentiality" as a factor in applying Section 1305 conflicts with tests in which essentially is not a factor at all. The question is not whether a factor is itself dispositive, but whether it is consistent with the congressional intent underlying Section 1305, and on that question, there is plainly a conflict between the decision below and other courts. *See* Pet. at 20-24.

C. The Decision Below Threatens The Core Objectives Of The Airline Deregulation Act.

Respondents completely miss the significance of the Department of Transportation's ruling. First, DOT determined that the institution of capacity ocntrols did not violate federal consumer protection laws applicable to airlines. The Illinois Supreme Court has concluded that the institution of capacity controls can violate analogous state consumer protection laws. There is thus a clear conflict between federal and state policy that provides an additional reason for plenary review. Second, respondents are simply wrong to contend that DOT's order says nothing about its view of the preemptive scope of Section 1305. The complainants argued in that proceeding that uniform federal rules governing blackout dates and ca-

[7] In addition, providing air transportation in exchange for frequent flyer credits (*i.e.,* providing "the transportation itself," to quote from *Hodges,* 4 F.3d at 354), is surely a more important part of the economic bargain between the passenger and the airline than providing "food and drink," or any of the other "services" that *Hodges* said would be within the preemptive scope of Section 1305.

pacity controls were necessary because without them airlines would be subjected to restrictive and conflicting state standards. The DOT rejected this argument because, in its view, Section 1305 would premept such state laws, even if enforced in common law breach of contract actions, thereby obviating the risk of conflicting state law obligations.[8]

CONCLUSION

The petition should be granted, and the judgment of the Illinois Supreme Court should be summarily reversed. Alternatively, the case should be set for plenary consideration.

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March 16, 1994

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[8] American's suits against coupon brokers have nothing to do with the issues presented here. None of those cases involved a dispute between an airline and a passenger. In none of those cases was the scope of Section 1305 raised or at issue. The claims in those cases had no relation to airline rates or services, except that airline services were the object of willful theft and misappropriation—often accomplished by illegal means such as manipulating American's computer records or counterfeiting documents. Those claims did not affect, directly or indirectly, the rates or services American offers.

No. 93-1286

In The

Supreme Court of the United States

October Term, 1993

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENTS' OPPOSITION TO MOTION OF AIR TRANSPORT ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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Respondents, on behalf of themselves and all others similarly situated, respectfully submit this objection to the motion of Air Transport Association of America for leave to file a brief *amicus curiae*. As grounds, Respondents state as follows:

1. This matter is before the Court on American Airline's Petition for Writ of Certiorari to the Supreme Court of Illinois ("Petition"). Respondents have opposed the Petition. Petitioner seeks review of a decision by the Illinois Supreme Court that plaintiffs' garden-variety breach of contract and consumer fraud claims against Petitioner for unilaterally changing the terms of the contract between Petitioner and members of its "frequent flyer" club were not pre-empted by federal law under the standards set forth in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992).

2. The issue before this Court is whether the Court should review the Illinois Supreme Court's fact-sensitive application of *Morales* to Petitioner's actions.

3. Air Transport Association of America ("ATA"), which seeks to file an *amicus* brief, is a trade association of which Petitioner American Airlines is a member. Consequently, any input ATA has with regard to the limited scope of this Petition should have been – and was – incorporated in the Petition. The proposed *amicus curiae* brief will not bring "relevant matter to the attention of the Court that has not already been brought to its attention by the parties". *See* Supreme Court Rule 37.1.

4. ATA tries to claim a special expertise to promote the broad, industry-wide perspective. ATA makes two arguments: (1) allowing plaintiffs' claims to stand would

have far-reaching effects on airline industry competition; and (2) allowing the claims would force airlines to modify their behavior to conform to Illinois law. Petitioner made both of these arguments in the Petition. *See* Petition at 3, 4, 11, 12, 16-17, 27-28. In their Response to the Petition, Respondents addressed these points, arguing, among other things, that a free deregulated market, supporting free competition, incorporates the principle that those who breach contracts or defraud others will be liable for damages. *See* Response at 8, 25. Respondents also argued that Illinois law does not differ markedly from other states' laws on contracts and fraud. *See* Response at 25-26.

5. Every purported conflict ATA asserts between the Illinois Supreme Court decision and other cases was asserted by Petitioner. Every case ATA cites was cited by Petitioner. Every complaint ATA makes about the impact of the Illinois Supreme Court's decision on airlines was made by Petitioner. Thus, ATA's proposed *amicus* brief merely regurgitates the arguments made in the Petition.

6. ATA has not demonstrated any special knowledge or expertise relating to the pre-emption provisions of the Federal Aviation Act and its motion illustrates that it has nothing further to add to Petitioner's argument.

7. It would be prejudicial to Respondents to allow Petitioner's own trade association to file an additional brief on the identical issues that Petitioner has raised and argued.[1]

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[1] ATA moved for leave to file an *amicus* brief before the Illinois Supreme Court on the remand from this Court. Respondents objected there, as here, that ATA merely reiterated the Petitioner's arguments. The Illinois Supreme Court refused to accept the *amicus* brief.

For the foregoing reasons, Respondents pray that the motion of Air Transport Association of America for leave to file a brief *amicus curiae* be denied.

Respectfully submitted,

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March 17, 1994

No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,
v.
MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1286

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2, the Air Transport Association of America ("ATA") moves for leave to file a brief *amicus curiae* in support of American Airlines' Petition For *Certiorari* from the decision of the Illinois Supreme Court issued December 16, 1993, after remand from this Court "for further consideration in the light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. ——."

In support of this motion it is stated that:

1. Consent to the filing of an *amicus* brief by ATA was sought in writing from counsel for all respondents and was denied in writing by said counsel. Petitioner has consented to the filing of an *amicus* brief by ATA.

2. The ATA is a non-profit unincorporated trade association of federally certificated air carriers providing scheduled passenger and cargo service. ATA's members account for more than 97 percent of the domestic passenger and cargo traffic flown annually by U.S. carriers.*

ATA's principal functions are to represent the interests of the commercial airline industry before Congress, state legislatures, and before federal and state courts. ATA also works closely with the various federal agencies which regulate the airline industry, such as the Federal Aviation Administration and the Department of Transportation. ATA has filed numerous amicus briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members.

ATA's members have a vital interest in the outcome of this case, which has far-reaching consequences to the airline industry. Almost all of ATA's passenger airline members have a frequent flyer award program similar to the award program offered by American Airlines. Indeed, this suit against American Airlines is only one of more than five such suits which have been brought against airlines in the Circuit Court of Cook County, Illinois, because of changes in frequent flyer programs.

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* ATA's members are: Operator Members: Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express, Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Air Lines, United Parcel Services, USAir.

Associate members are Air Canada and Canadian Airlines International.

The decision below marks Illinois as the forum of choice for debilitating nationwide class action damage suits against the airline industry which are designed to restrict and effectively to regulate general competitive programs and practices adopted by members of the industry as applicable to all their respective passengers.

Each airline's frequent flyer program may differ in certain respects from the program of other airlines, and changes in the airline's program may be made at different times or in a different manner than those of other airlines. It is the broad picture, industry-wide, of the impact of interference from multiple-State laws on the freedom to administer frequent flyer programs in a competitive industry which ATA is particularly qualified to bring to the Court's attention. The broad contentions here of plaintiffs' class action under Illinois common and statutory law, if accepted, could require the highly successful frequent flyer programs—progeny of Congress' decision to infuse free market competition into the U.S. airline industry—to be radically modified or even terminated to the substantial public detriment. Moreover, Illinois' open invitation to bring nationwide class action suits for damages against airlines threatens all of the innovative competitive practices and policies adopted by airlines since Congress deregulated the airline industry in 1978, in direct contravention of the purposes of the Airline Deregulation Act.

The brief *amicus curiae* submitted by ATA highlights for the Court the important role in the airline industry played by frequent flyer and other competitive marketing programs and the importance of reviewing the decision below in order to keep these industry-wide aspects of competitive airline operations free from control by the State of Illinois and from varying controls in 50 states.

WHEREFORE, ATA prays that leave to file the attached brief *amicus curiae* in support of the Petition For *Certiorari* of American Airlines be granted.

Respectfully submitted,

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QUESTION PRESENTED

In the light of *Morales v. T.W.A.*, can the States in effect regulate system-wide competitive programs and practices of the nation's commercial airlines by permitting nationwide class suits for damages against the airlines under State common law and consumer protection statutes?

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On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

OPINION BELOW

The opinion of the Illinois Supreme Court on remand from this Court "for further consideration in the light of *Morales v. T.W.A.*" is reproduced in Appendix A (pp. 1a-16a) of the Petition for *Certiorari*.

STATUTORY PROVISIONS INVOLVED

Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. Sec. 1305(a)(1):

> ". . . [N]o State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes or services of any air carrier. . . ."

THE INTEREST OF AIR TRANSPORT ASSOCIATION *AMICUS CURIAE*

O'Hare International Airport is the busiest airport in the nation. All of the major commercial airlines operate there and are subject to the jurisdiction of the local county courts to which are entrusted the enforcement of the vague and expansively-worded Illinois Consumer Fraud Act and Illinois common law.

A class suit filed under Illinois law in Cook County, Illinois, against an airline or several airlines cannot be removed to the federal court. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). The decision of the Illinois Supreme Court gives the local courts undue power to pass upon the propriety of the airlines' actions in connection with their system-wide marketing and operational policies, and threatens to engulf all the major carriers in restrictive and costly nationwide class suits seeking crippling amounts of damages and attorneys' fees.

Already more than five such suits have been brought in the Circuit Court of Cook County, Illinois, against major airlines challenging changes in their respective competitive frequent flyer programs. One of these, against Delta Air Lines, Inc., has been dismissed without prejudice with leave to re-file depending on the final outcome in this *Wolens* case.

The Air Transport Association, as *amicus curiae*, strongly believes that if the decision below of the Illinois Supreme Court stands, airline deregulation will become a nightmare of local restrictions on the airlines' competitive policies and practices, first in Illinois, as the forum of choice for nationwide class actions against airlines, and then in other States, should this Court refuse to act in this case. Under airline deregulation, as formulated by Congress, freedom from divergent state law requirements, particularly from requirements of 50 states, is essential to the administration and implementation of vigorous price and service competition throughout the airline industry. This was the express purpose of the Airline Deregulation Act of 1978 in general and of Section 1305(a)(1) of the Act in particular. Forcing the nation's airlines to conform their competitive practices and policies to the vagaries of local laws stands the Airline Deregulation Act on its head.

Amicus speaks for its members, who comprise most of the nation's airlines, when it urges that the competitive framework of commercial air transportation in this country—and the accompanying benefits to consumers and commerce—is seriously jeopardized by the decision below.

STATEMENT OF THE CASE

Frequent flyer programs are a significant part of the rate and service structure of today's commercial air carriers. They are a prime device for marketing the rates and services of one airline as against its competitors and constitute one of the most creative competitive innovations of the post-deregulation era. The Department of Transportation has recognized that, in addition to stimulating competition, frequent flyer programs have generated enormous and increasingly broad benefits to consumers. (DOT Report, "Secretary's Task Force on Competition in the U.S. Domestic Airline Industry", February 1990, pp. 31-41).

The air travel benefits of airline frequent flyer programs are a significant factor in the airlines' ability to market their product and have a substantial—not a tenuous, remote or peripheral—impact upon airline rate and service structures. Frequent flyer bonuses are often used in place of fare discounts to stimulate additional traffic, in a manner that entails less risk than, for example, broadly lower-

ing fares.[1] Like all operators in a highly competitive environment, the airlines have dramatically and continually enhanced the travel benefits available under their programs and, in order to manage the cost impact, have modified the terms under which awards are earned.

Amicus incorporates the Statement of the Case contained in the Petition for *Certiorari*.

SUMMARY OF ARGUMENT

The Illinois Supreme Court has openly misapplied *Morales* in its decision on remand, with the result of establishing Illinois as a haven for nationwide class suits. The effect is to regulate *de facto* under state law the panoply of competitive marketing programs and practices adopted by the nation's airlines. Already, all of the largest passenger carriers have faced legal challenges in Illinois state courts—involving millions of airline passengers—concerning the administration of an important competitive initiative, namely, frequent flyer programs.

Frequent flyer programs are an integral part of the rate and service structure of commercial airlines under deregulation, just as are many, if not most, of the general policies or practices adopted by the airlines in order to survive in a highly competitive industry. If the decision below is allowed to stand, then the flood-gates are opened to the very evil of local interference with the air transportation system which Section 1305(a)(1) was intended to prevent.

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[1] See, e.g., *New York Times*, Sunday, January 17, 1993, Travel Section, "Frequent Flyer Bonuses Bloom."

ARGUMENT

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE DECISION BELOW HAS A DIRECT IMPACT ON THE RATES AND SERVICES OF EVERY PASSENGER AIR CARRIER AND IT COMPROMISES THE ENTIRE FEDERAL SCHEME FOR DEREGULATING THE NATION'S AIR TRANSPORTATION SYSTEM.

The Airline Deregulation Act of 1978 was expressly intended to substitute competition for regulation of the commercial airlines. The airlines have adapted their operations to meet the demands of the marketplace and disruption thereof would be catastrophic to the industry as a whole. Pre-emption under Section 1305(a)(1) was specifically designed to prevent the disastrous effect upon the airlines of a State or States substituting local regulation to fill the void left by federal deregulation. Section 1305(a)(1)'s "broad pre-emptive purpose" (*Morales*, 112 S. Ct., at p. 2037) is essential to nurturing vigorous competition with respect to rates, routes and services and to the operation of the national air transportation system.

Under *Morales*, pre-emption applies to state laws which "have a significant impact upon the airlines' ability to market their product, and hence a significant impact on the fares they charge" even if "the effect [of these factors] is only indirect" ("tangential") on the airlines' specific published rates and services. *Morales*, 112 S. Ct., at pp. 2038, 2040. The very essence of a frequent flyer program is its use as a marketing device to sell the airline's product of air transportation, just as the Complaint in this case alleges. (Pet. App. 5a.) An airline ticket or a service upgrade acquired under a frequent flyer program obviously has a direct "connection with or reference to" the rates and services of the carrier (*Morales*, 112 S. Ct., at p. 2037), and the disregard of that connection by the court below—on grounds that pre-emption only applies to historically "essential" elements (i.e., back to the era of regulation)

to the c eration of an airline and does not apply to suits for damages—is patently insupportable.

Despite this Court's clear directive in *Morales*, the Illinois Supreme Court has applied Section 1305 narrowly, and indeed has adopted a constricted test that leaves the States free to apply their varying local laws to all aspects of an air carrier's operations and services that the state courts do not consider "essential." (Pet. App. 6a.) The Illinois Supreme Court further concluded that Respondents' claims for compensatory and punitive damages are not pre-empted because a damage award does not "seek to establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." (Pet. App. 6a.) As Justice McMorrow pointed out in her dissent, that test effectively limits the scope of pre-emption to state laws that actually *regulate* airline rates, routes or services—a standard that *Morales* explicitly rejected as reading the words "relating to" out of the pre-emption statute (112 S. Ct., at 2037-38) and as effectively excluding from pre-emption all state common law and all state statutes and regulations that do not expressly target airlines. (Pet. App. at 9a.) Indeed, the Seventh Circuit has held that an award of damages sought under the same Illinois common law and consumer protection statute at issue below was pre-empted under *Morales* and Section 1305 precisely because a damage award would constitute improper state regulation of airline "rates." *Statland v. American Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 603 (1993).

By limiting the reach of Section 1305 to "essential" airline operations, the Illinois Supreme Court has created an exception that engulfs the rule of pre-emption. Its decision is an open invitation to plaintiff class action suits and ensures that Illinois will be the leading forum of nationwide litigation against airlines. Indeed, that phenomenon already has occurred. As Petitioner points

out, American, United and Delta, the nation's three largest air carriers, are the subject of nationwide class actions brought in Illinois challenging the carriers' practices with respect to ticket refund policies and their administration of frequent flyer programs.[2] If the decision below is allowed to stand, Illinois law will be used to determine the legal obligations of the major air carriers to millions of passengers throughout the nation, and thus will establish a *de facto* national standard to which the airlines must conform their conduct. As a result, the key objective of the Airline Deregulation Act—to encourage innovative competition without local interference—is seriously threatened. Even now the airlines are under enormous pressure to operate their frequent flyer programs in accordance with the particular requirements of Illinois law and the NAAG Guidelines, to which Illinois is a signatory.[3]

As the concentration of class action suits against airlines in Illinois demonstrates, plaintiffs clearly understand that Illinois offers the most hospitable forum in the country in which to sue airlines. This pattern is certain to expand to encompass other features of airline rates, routes and services that extend well beyond frequent flyer programs and airline ticket refund policies. In broad-ranging contexts, Illinois law will determine whether particular features of airline operations are "essential", and therefore pre-empted, or "not essential" and therefore subject to the requirements of local law. *See, e.g., Corporate Travel Consultants v. United Airlines, Inc.*, 799 F.Supp. 58 (N.D. Ill. 1992) (although state law claims chal-

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[2] See Petition For *Certiorari*, p. 11, n.18, 19, 20. Since the Illinois Supreme Court's decision yet another class action suit against an airline has been filed in the Circuit Court of Cook County, Illinois, challenging changes that the carrier made in its frequent flyer program. *Greenberg v. United Airlines*, No. 94 CH 499.

[3] See *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031 (1992), Appendix to Opinion, 112 S.Ct., at pp. 2049-2054.

lenging airline's use of computerized reservation systems "relate to" rates under *Morales*, federal court did not have removal jurisdiction and action was remanded to Illinois state court). Under the Illinois Supreme Court's test, longevity appears to be the touchstone for determining what is "essential" to airline operations ("the airline industry functioned successfully for decades" without frequent flyer programs.) (App. 6a)). That standard would cover all of the competitive innovations, contemplated by Congress, that the airlines have implemented since Congress enacted the Deregulation Act in 1978. In this era, in which many air carriers are struggling to remain solvent, the airlines can ill afford to have their ability to compete crippled by compliance with purely local restrictions. Because the decision of the Illinois Supreme Court threatens precisely that result, it is imperative that this Court grant review.

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE ADDITIONAL GUIDANCE IS NEEDED IN ORDER TO ELIMINATE THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THE FEDERAL COURTS OF APPEALS AND OTHER LOWER COURTS.

The decision below stands in direct conflict with the decisions of federal courts of appeals, including the Seventh Circuit, with which the Illinois Supreme Court shares concurrent geographic jurisdiction. The conflict between many decisions of the lower courts and the decision below attests to the urgent need for additional guidance on the scope of Section 1305(a)(1) preemption.

These conflicts involve both the scope of the "relating to" language in Section 1305(a)(1) and the question whether preemption turns on the form of relief requested. The Seventh Circuit has applied Section 1305 in precisely the straight-forward manner that *Morales* and the plain language of the statute command, holding that state law claims for money damages based on an airline's ticket refund policies "obviously" relate to airline rates.

Statland v. American Airlines, Inc., 998 F.2d 539, *cert. denied*, 114 S.Ct. 603 (1993). Under the Illinois Supreme Court's "essential operations" test, however, it is unlikely that the claims presented in *Statland*, which were brought under the same Illinois common law and consumer fraud statute that respondents invoke here, would have been pre-empted.

Likewise, the decision below, which broadly excludes from pre-emption all claims involving frequent flyer programs because those programs are not "essential," directly conflicts with *Shaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D. Cal. 1992), which holds that damage claims asserted on behalf of members of an airline's frequent flyer program "relate to" airline services and are pre-empted.

The Fifth Circuit has held that airline "services," as used in Section 1305, encompass all state law claims relating to "the contractual arrangement between the airline and the user of the service." *Hodges v. Delta Air Lines, Inc.*, 4 F.3d 350, 354 (5th Cir. 1993), *pet'n for rehearing en banc granted*, 1994 WL 6232 (Jan. 12, 1994). All of the class actions now pending in Illinois state courts, including the *Wolens* case, involve the contractual relationship between airline and passenger and would appear to be pre-empted in the Fifth Circuit.

The lower courts have also reached decisions conflicting with the decision below regarding whether preemption under Section 1305 turns on the form of relief requested. For example, in *West*, a suit by a single passenger for an individual wrong, the Ninth Circuit held that an award of punitive damages under state law against an air carrier for "bumping" a passenger from an oversold flight is pre-empted because it would penalize an airline for engaging in "accepted forms of price competition and reduction in the deregulation era." *West v. Northwest Airlines*, 995 F.2d 148, 152 (9th Cir. 1993), *cert. den.* 62 U.S.L.W. 3396 (2/22/94) (No. 93-803). In contrast, the decision below allows claims

for punitive damages, as well as compensatory damages, to stand. In *Vail v. Pan Am Corp.*, 616 A.2d 523 (N.J. 1992), the court specifically rejected the argument that claims for damages were not pre-empted because they did not seek to "regulate" the airline's conduct and that any effect of a damage award on rates, routes or services would be "remote." 616 A.2d at 525. The court concluded that "plaintiffs challenge the 'service' itself and demand as damages the return of the 'rate' the airlines charged for services never provided." (*Id.*, at 527.) The Illinois Supreme Court held in the decision below that respondents' request for an injunction was pre-empted because it would constitute regulation of airline services, but that an award of damages, including punitive damages, is not pre-empted because damages do not "establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide". (App. at 6a.)

The "connection with or reference to rates, routes or services" is clear when a class suit is brought for virtually unlimited amounts of damage on behalf of all present and former passengers because of a general marketing practice adopted in order to sell airline seats in a highly competitive industry. Many, if not most, such general policies and practices will "relate to" rates, routes or services within the meaning of *Morales*—just as in this case the frequent flyer program does. In such nationwide class suits, state regulation, contrary to Section 1305(a)(1), "can be as effectively exerted through an award of damages as through some form of preventative relief". *Cipollone v. Liggett Group*, 112 S.Ct. 2608, 2620 (1992). *See also, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239, 246-9 (1959).

The major carriers conduct business in each of the 50 states. If the decision below regarding Section 1305 (a)(1) is permitted to proliferate, the airlines will confront the impossible task of attempting to conform their conduct to the varying and inconsistent standards of each

jurisdiction in and through which they transport passengers. The only way that the airlines can protect themselves from crippling damage suits in one jurisdiction or another is to conform the conduct of their system-wide programs and practices to the laws of the State that establishes the most restrictive regulatory standards—in effect substituting state law for the federal regulation that Congress eliminated in 1978. That is precisely the nightmare of local regulation that Congress intended to preclude when it enacted Section 1305(a)(1) of the Airline Deregulation Act of 1978.

Certiorari should be granted because additional instruction from this Court, addressed to the grounds of the decision below, is urgently needed.

CONCLUSION

The decision below jeopardizes the Congressional goal of stimulating vigorous innovative competition under deregulation of the nation's airlines. This Court should grant *Certiorari*, adopt the dissenting opinion below, summarily reverse the decision of the Illinois Supreme Court and remand the case for dismissal of the plaintiffs' class suit claims.

Respectfully submitted,

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No. 93-1286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 8, 1994
CERTIORARI GRANTED APRIL 4, 1994

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JOINT APPENDIX

Note:

The following items do not appear in this Joint Appendix but were reproduced in the Appendix of the Petition for Writ of Certiorari:

P.S. Tucker, et al. American Airlines, Inc.

Case No. 89-CH-119

RELEVANT DOCKET ENTRIES

Date	Pleading
January 6, 1989	Class Action Complaint (Greenfield & Chimicles) and (Class—Chertow & Miller)
January 12, 1989	Summons (Chertow & Miller)
January 24, 1989	Notice of Motion (Jenner & Block)
January 24, 1989	Appearance (Jenner & Block)
January 24, 1989	Motion to Dismiss (Jenner & Block)
January 24, 1989	Alternative Motion to Dismiss, etc. (Jenner & Block)
January 24, 1989	Motion to Consolidate (Jenner & Block)
January 24, 1989	Exhibits
February 2, 1989	Alias Summons
March 23, 1989	Notice of Motion (Jenner & Block)
March 23, 1989	Motion for Cert. (Jenner & Block)
March 23, 1989	Interlocutory Appeal
April 4, 1989	Notice of Motion (Much, Shelist, et al.)
April 4, 1989	Agreed Motion for Extension of Time, et al.
April 7, 1989	Notice of Filing
April 7, 1989	Plaintiffs' Memo in Opposition to Defendant's Motion, et al.
April 7, 1989	Exhibits
April 21, 1989	Notice of Filing (Jenner & Block)

Date	Pleading
5/23/89	American's Motion to Stay Discovery (Jenner & Block)
5/23/89	Notice of Motion
5/23/89	Memorandum in Opposition to Plaintiff's, et al.
5/28/89	Exhibits
June 14, 1989	Motion to Stay (Jenner & Block)
June 14, 1989	Notice of Motion
January 9, 1990	Notice of Motion
February 21, 1991	Mandate

Date	Order
January 26, 1989	(CH3-1838) Motion to Consolidate set for 2/9/89 at 10:30 (Shields)
May 2, 1989	(CH18-1408) Order—Prayers for Injunction Dismissed with Prejudice and Prayers for Punitive Damages Dismissed without Prejudice and Prayers for Monetary Relief Stricken and Plaintiff Given Leave to File Amended Complaint by (6/6/89) (Dunne)
June 16, 1989	(CH26-140) Order—Proceedings Stayed Per Order and Case Set for Status on 12/14/89 at 10:00 a.m. (Dunne)
December 13, 1989	(CH53-1000) Reset from 12/14/89 at 10:00 a.m. to 1/4/90 at 10:00 a.m. (Dunne)
January 4, 1990	(CH56-523) Order—Case Dismissed without Prejudice and with Leave to Reinstate (Dunne)
February 1, 1990	(CH5-675) Plaintiffs' Motion to Vacate Order 1/4/90 Dismissed as Without Prejudice and Case Reinstated and Stay Extended 5/16/89 Vacated (Dunne)
May 8, 1990	(CH21-1237) Order—Continuing Status to 8/7/90 at 10:00 a.m. (Dunne)
August 7, 1990	(CH37-1234) Order—Case Set for Status 11/29/90 at 10:00 a.m. (Dunne)

RELEVANT DOCKET ENTRIES

Date	Pleading
August 19, 1988	Complaint & Copy (Gilbert W. Gordon)
August 30, 1988	Summons
September 9, 1988	Appearance (Peterson)
September 14, 1988	Stipulation (Peterson)
September 23, 1988	Notice (Peterson)
September 23, 1988	Removed Bond (Peterson)
September 23, 1988	Petition for etc.
September 23, 1988	Exhibits
October 26, 1988	Notice (Peterson)
November 9, 1988	Notice of Motion (Jenner & Block)
November 9, 1988	Motion to Substitute (Jenner & Block)
November 9, 1988	Substitution of Attorneys (Jenner & Block)
December 19, 1988	Notice of Filing (Jenner & Block)
December 19, 1988	Motion to Dismiss (Jenner & Block)
December 19, 1988	Memorandum in Support of Motion to Dismiss (Jenner & Block)
December 19, 1988	Motion to Dismiss Alternative et al. (Jenner & Block)
December 19, 1988	Memorandum in Support of Motion to Dismiss (Jenner & Block)
December 19, 1988	Exhibits for Defendant's Memorandum et al. (Jenner & Block)
December 21, 1988	Notice of Motion
December 21, 1988	Motion for Admission of Counsel

Date	Pleading
December 21, 1988	Agreed Motion to Set Briefing Schedule, et al.
December 23, 1988	Notice of Filing
December 23, 1988	Supplemental Exhibits to Memorandum in Motion to Dismiss
December 23, 1988	Exhibits
January 26, 1989	Notice of Motion (Marks, Marks & Kaplan)
January 26, 1989	Motion to Extend Time
January 31, 1989	Notice of Filing
January 31, 1989	Plaintiff's First Request for Production of Documents
February 6, 1989	Motion to Stay Discovery (Jerold S. Solovy)
February 6, 1989	Notice of Motion (Jerold S. Solovy)
February 28, 1989	Notice of Motion (Marks, Marks & Kaplan)
February 28, 1989	Amended Petition for Change of Venue
March 1, 1989	Notice of Filing
March 1, 1989	Plaintiff's Joint Memorandum in Opposition, et al.
March 1, 1989	Exhibits to Plaintiff, et al.
March 13, 1989	Notice of Filing (Jenner & Block)
March 13, 1989	Reply Memorandum in Support, etc. (Jenner & Block)
March 23, 1989	Letter (Laura Kaster)
March 23, 1989	Notice of Motion (Jenner & Block)
March 23, 1989	Defendant's Motion for Cert. of Que., etc. (Jenner & Block)

Date	Pleading
April 4, 1989	Notice of Motion
April 4, 1989	Agreed Motion for Extension of Time, etc. (Edith F.C.)
April 7, 1989	Notice of Filing (Much, Shelist)
April 7, 1989	Plaintiff's Memorandum in Opposition to Defendant's etc. (Much, Shelist)
April 7, 1989	Exhibits
April 21, 1989	Notice of Filing (Jenner & Block)
April 21, 1989	Defendant's Reply Memorandum in Support of etc. (Jenner & Block)
	Memorandum in Opposition to Plaintiff's Motion etc. (Jenner & Block)
	Exhibits (Jenner & Block)
	Notice of Motion (Jenner & Block)
	American's Motion to Stay Discovery (Jenner & Block)
May 25, 1989	Amended Notice of Motion (Marks, Marks)
May 25, 1989	Motion to Compel Production (Marks, Marks)
May 26, 1989	Notice of Filing (Marks, Marks)
May 26, 1989	Joint 1st Amended Class Action, etc. (Marks, Marks)
June 14, 1989	Notice of Motion (Jenner & Block)
June 14, 1989	Motion of Defendant to Stay, etc. (Jenner & Block)
June 14, 1989	Exhibits
June 28, 1989	Letter
January 31, 1990	Notice of Filing (Jenner & Block)

Date	Pleading
January 31, 1990	Motion of Defendant to Vacate Order of Dismissal (Jenner & Block)
February —, 1990	Notice of Motion (Marks, Marks)
February —, 1990	Motion to Vacate Order of Dismissal and Reinstate Case (Marks, Marks)
February 21, 1991	Mandate
February 28, 1991	Recall Mandate

RELEVANT DOCKET ENTRIES

Date	Order
November 14, 1988	(CH45-407) Order—Leave for Defendant to Answer or Otherwise Plead by 12/14/88 (Shields)
December 15, 1988	(CH49-664) Order—Leave for Defendant to Answer or Otherwise Plead by 12/19/88 (Shields)
December 23, 1988	(CH50-999) Order—Hearing on 2-619 Motion Set for 2/22/89 at 11:00 a.m.; American's 2-615 Motion Ent. and Cont. (Shields)
December 23, 1988	(CH58-10—) Order—Leave for American Airlines to File Appearance of Joseph Tate and Christine Levin as counsel *pro hac vice*
January 26, 1989	(CH3-1833) Motion to Extend Time set for 2/8/89 at 10:30 a.m. (Shields)
February 8, 1989	(CH5-827) Order—Motion to Dismiss Set for 3/2/89 at 11:00 a.m. (Shields)
February 23, 1989	(CH7-311) Order—Continued to 3/10/89 at 10:30 (Shields)
December 28, 1989	(CH7-1402) Order—Plaintiff's Original for Change of Venue with Hearing Withdrawn; Dates of 3/10/89 and 3/20/89 Stricken
February, 1989	(CH7-1403) Order—FWD to Reassign (Shields)
March 21, 1989	(CH11-18) Order—Memorandum, Opinion and Defendant's Motion to Dismiss Denied and Defendant to Answer or Plead Ten Days After Hearing on Pending 2-615 Motion

	Order
February, 1989	(CH 11-24) Order—Defendant's Motion to Dismiss Denied and Plaintiff's File Opposition Brief to Defendant's Motion to Strike; Set Hearing for 5/2/89, 11:00 a.m. and Defendants File Answer to Complaint Ten Days or by 5/12/89
March 23, 1989	(CH11-1004) (1) Order—Defendant's Motion for Certification of Question for Interlocutory Appeal; (89CH11-1006) (2) Order—Plaintiff's Motion to Withdraw Jury Demand Granted (Dunne)
April 4, 1989	(CH13-1331) Order—Time Extended for Plaintiff's to File Response Brief to 4/7/89 and Time Extended for Defendants to File Reply to 4/21/89 (Dunne)
May 2, 1989	(CH18-1408) Order—prayers for Injunction Dismissed with Prejudice and Prayers for Monetary Relief Stricken and Plaintiff has Leave to File Amended Complaint within 35 Days, 6/6/89 (Dunne)
May 25, 1989	(CH22-1027) Plaintiff Given to 6/14/89 to File Reply Memo and American File Reply Memo by 6/28/89; Plaintiff's Motion to Compel and American's Motion to Stay Discovery Set for Hearing 7/11/89 at 11:00 a.m. (Dunne)
June 16, 1989	(CH26-140) Order—Proceeding stayed Per Order and Case Set for Status 12/14/89, 10:00 a.m. (Dunne)
December 13, 1989	(CH53-1000) Status 12/14/89 at 10:00 a.m. (Dunne)
January 4, 1990	(CH56-523) Order—Case Dismissed without Prejudice with Leave to Reinstate (Dunne)

	Order
February 1, 1990	(CH5-675) Plaintiff's Motion to Vacate Order of 1/4/90 Dismiss Case Without Prejudice Granted and Case Reinstated and Stay Extended to 5/16/89 Vacated (Dunne)
May 8, 1990	(CH21-1237) Order—Continuing Status to 8/7/90 at 10:00 a.m. (Dunne)
September 14, 1990	(CH43-1168) Order—Plaintiff's Motion Entered and Continued to 9/17/90 at 11:00 a.m., Certain Party Leave to File Response Instanter (Dunne)
November 29, 1990	(CH55-897) Order—Set Status 5/16/91 at 10:00 a.m. (Dunne)
January 1, 1991	(CH2-305) Order—Case Stricken from Calendar (Dunne)
May 16, 1991	(CH26-1433) Order—Case on Dormant Call (Dunne)
May 11, 1994	Mandate Affirmed

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 88-C-770W

AMERICAN AIRLINES, INC.,
Plaintiff,
vs.

PLATINUM WORLD TRAVEL; COUPON CONNECTION; ERNEST W. CARLSON; BRUCE H. BRIGGS; ROBERT J. BAUMANN; and RANDALL CHRISTENSEN;
Defendants.

COMPLAINT

[Filed Aug. 31, 1988]

Plaintiff AMERICAN AIRLINES, INC. ("AMERICAN"), for its Complaint against PLATINUM WORLD TRAVEL; COUPON CONNECTION; ERNEST W. CARLSON; BRUCE H. BRIGGS; ROBERT J. BAUMANN; and RANDALL CHRISTENSEN, alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1332 and 1331 in that (1) the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs, and is between citizens of different states and (2) certain of AMERICAN's claims arise under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* Jurisdiction is also founded on the principles of ancillary and pendent jurisdiction.

2. Venue is proper pursuant to 28 U.S.C. §§ 1391 and 1392 and 18 U.S.C. § 1965 in that the claim arose in this District, defendants do business in this District,

transact their affairs in this District, are found in this District, and reside in this District.

OVERVIEW OF THIS COMPLAINT

3. AMERICAN brings this action to enjoin and recover damages resulting from defendants' ongoing pursuit of a business whose essential purpose is to commit and induce others to commit willful violations of the rules of the AAdvantage frequent flyer program so that defendants may wrongfully sell valuable tickets on AMERICAN flights without compensating AMERICAN. Defendants have perpetrated this unlawful scheme by engaging and inducing others to engage in a pervasive pattren of dishonest conduct calculated to conceal the violations of the AAdvantage rules which constitute the essence of defendants' business. As alleged more fully below, this pattern of dishonesty includes paying AAdvantage members to obtain and wrongfully resell AAdvantage awards, good for free and discount travel on AMERICAN; directing those AAdvantage members to conceal and misrepresent material facts in order to avoid detection by AMERICAN; selling said AAdvantage awards and or tickets on AMERICAN flights based on the unlawfully obtained AAdvantage awards, in violation of the AAdvantage rules; inducing and directing the purchasers of those tickets not only to conceal material facts, but to lie in response to inquiries from AMERICAN regarding the source of their tickets and how they obtained them; and procuring and reselling AAdvantage awards that have been obtained through computer fraud, theft and deception. Based on their improper conduct, defendants have caused AMERICAN to provide valuable services on AMERICAN flights without compensation. AMERICAN has lost millions of dollars in revenue, while its relationships with AAdvantage members, other actual and potential customers, as well as authorized travel agents, have been seriously interfered with and damaged in numerous respects.

PARTIES

4. Plaintiff AMERICAN AIRLINES, INC. is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at 4200 American Boulevard, Fort Worth, Texas 76155. It engages in the business of air carriage of passengers and cargo.

5. Defendant PLATINUM WORLD TRAVEL ("PLATINUM") is a corporation organized and existing under the laws of the State of Utah with its principal place of business at 40 South Redwood Road, Suite 103, North Salt Lake City, Utah. At all relevant times PLATINUM has engaged in the business of procuring and providing for sale on a nationwide basis airline frequent flyer awards for air transportation on AMERICAN and other airlines.

6. Defendant COUPON CONNECTION is a partnership which AMERICAN alleges on information and belief is owned by defendants ERNEST W. CARLSON, BRUCE H. BRIGGS and ROBERT J. BAUMANN, and is doing business from an office located at 40 South Redwood Road, Suite 103, North Salt Lake City, Utah. At all relevant times COUPON CONNECTION has engaged in the business of procuring and providing for sale on a nationwide basis airline frequent flyer awards for air transportation on AMERICAN and other airlines.

7. Defendant ERNEST W. CARLSON ("CARLSON") is a citizen of the State of Utah and resides in this District. AMERICAN alleges on information and belief that CARLSON is the vice president, and a director, shareholder and employee, of defendant PLATINUM, and is an owner of defendant COUPON CONNECTION. At all relevant times CARLSON has engaged in the business of procuring and providing for sale on a nationwide basis airline frequent flyer awards for air transportation on AMERICAN and other airlines.

8. Defendant BRUCE H. BRIGGS ("BRIGGS") is a citizen of the State of Utah and resides in this District. AMERICAN alleges on information and belief that BRIGGS currently is the president, and a director, shareholder and employee, of defendant PLATINUM, and is an owner of defendant COUPON CONNECTION. At all relevant times BRIGGS has engaged in the business of procuring and providing for sale on a nationwide basis airline frequent flyer awards for air transportation on AMERICAN and other airlines.

9. Defendant ROBERT J. BAUMANN ("BAUMANN") is a citizen of the State of Utah and resides in this District. AMERICAN alleges on information and belief that defendant BAUMANN is the secretary, and a director and employee, of defendant PLATINUM, and is an owner of defendant COUPON CONNECTION. At all relevant times BAUMANN has engaged in the business of procuring and providing for sale on a nationwide basis airline frequent flyer awards for air transportation on AMERICAN and other airlines.

10. Defendant RANDALL CHRISTENSEN ("CHRISTENSEN") is a citizen of the state of Utah and resides in this District. AMERICAN alleges upon information and belief that CHRISTENSEN is the comptroller of defendant PLATINUM and is associated with defendant COUPON CONNECTION. At all relevant times CHRISTENSEN has engaged in the business of procuring and providing for sale on a nationwide basis airline frequent flyer awards for air transportation on AMERICAN and other airlines.

11. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, were and are involved as officers, directors and/or owners of a variety of entities, corporate and otherwise, including PLATINUM, COUPON CONNECTION and TEXAS BUDGET FLIGHTS, INC., a corporation organized and existing

under the laws of the State of Texas which also is doing business under the assumed name TEXAS TRAVELER. TEXAS BUDGET FLIGHTS, INC. lists defendants CARLSON and BRIGGS, both of 40 South Redwood Road, North Salt Lake City, Utah, as directors and as president and secretary respectively, and defendant BAUMANN as president of TEXAS TRAVELER. (TEXAS BUDGET FLIGHTS, INC. and TEXAS TRAVELER hereinafter are referred to collectively as "TEXAS TRAVELER.") TEXAS TRAVELER regularly conducts business in this District, and lists its tax address as 40 South Redwood Road, North Salt Lake City, Utah, maintains a bank account in Ogden, Utah. At all relevant times TEXAS TRAVELER has engaged in the business of procuring or providing for sale on a nationwide basis airline frequent flyer awards for air transportation on AMERICAN and other airlines.

12. AMERICAN alleges, upon information and belief, that at all relevant times each of the named defendants and their co-conspirators was, in engaging in the acts described herein, acting with the consent of the co-defendants or their later ratification.

FACTS COMMON TO ALL CLAIMS

The AAdvantage Program

13. In May 1981, AMERICAN launched the AAdvantage program, an awards program especially designed to be attractive to its best customers, *i.e.*, those who frequently fly on AMERICAN. AMERICAN conceived, designed and implemented the AAdvantage program to reward repeat customers and thereby develop customer loyalty by encouraging a closer and more continuous relationship between AMERICAN and its best customers.

14. AMERICAN offered its customers the opportunity to become AAdvantage members and agreed to establish mileage accounts in which AMERICAN would keep

track of the total number of miles that the member-customer flies on AMERICAN. AMERICAN offered its member-customers, in consideration of their accumulating specified numbers of miles flying on AMERICAN, the opportunity, subject to the rules of the AAdvantage program, to obtain free and discount travel and to upgrade from coach to first class service on future flights on AMERICAN to specified destinations.

AAdvantage Rules

15. AMERICAN structured the rules of the AAdvantage program which govern the use of AAdvantage mileage credits specifically to provide a benefit for its best customers that would develop their loyalty to AMERICAN without diminishing its opportunity to sell tickets on AMERICAN to its other customers and its potential customers who are not members of the AAdvantage program. These rules define the economic relationship between AMERICAN and members of the AAdvantage program.

16. Two of the most important rules AMERICAN put into its AAdvantage program to accomplish the above-described purposes are:

(a) The AAdvantage mileage and AAdvantage awards cannot be purchased, bartered, or sold

(b) AAdvantage mileage or awards are void if transferred for cash or other consideration.

17. Under the rules of the AAdvantage program an AAdvantage member-customer, upon accumulating sufficient mileage to be eligible for an award, must notify AMERICAN in writing of the award he or she desires to claim (*e.g.*, a free round-trip from Los Angeles to New York).

18. Under the rules of the AAdvantage program prohibiting the purchase, barter or sale of AAdvantage mileage or awards, AAdvantage certificates may be issued in

any name designated in writing by the AAdvantage member at the time he or she requests that they be issued, but once an award certificate is issued, it is not transferable except to the designated recipient's family members with the same surname or to the recipient's spouse.

19. Under the rules of the AAdvantage program, AMERICAN will mail the AAdvantage award certificate only to the AAdvantage member requesting the award at his or her address on file with AMERICAN.

20. Under the rules of the AAdvantage program, the award certificate must be exchanged for tickets for air travel at AMERICAN ticketing locations.

21. Under the rules of the AAdvantage program, tickets will be issued to the individual designated as the passenger on the award certificate, a family member with the same surname, or the spouse of the designated passenger.

22. Under the rules of the AAdvantage program, travel awards and special offers are subject to change without notice. AMERICAN reserves the right to modify or to terminate the program at any time.

Notice of AAdvantage Rules

23. AMERICAN notifies AAdvantage members of the rules governing the AAdvantage program in several ways. AMERICAN sends new members a copy of a brochure outlining the rules governing the AAdvantage program when they join the program. The brochure sets forth the rules described above, including the two key AAdvantage rules, to wit (a) the purchase, barter or sale of AAdvantage mileage or AAdvantage awards is prohibited and (b) AAdvantage mileage and awards are void if transferred for cash or other consideration.

24. AMERICAN regularly restates these two key AAdvantage rules in additional materials AMERICAN sends to its AAdvantage members, including:

(a) AAdvantage Flight Award Certificates and AAdvantage Certificate Fulfillment Inserts that AMERICAN sends to each AAdvantage member claiming a mileage award.

(b) AAdvantage mileage award statements that AMERICAN sends to each of its AAdvantage members each month indicating the number of miles that the member has flown on AMERICAN as of a date specified.

(c) AAdvantage newsletters that AMERICAN sends periodically providing information on special awards.

25. Defendants were members of AMERICAN's AAdvantage program. More specifically, CARLSON holds 3 AAdvantage accounts, BRIGGS holds 1 AAdvantage account, BAUMANN and CHRISTENSEN each hold 2 AAdvantage accounts, and other employees and officers of PLATINUM and COUPON CONNECTION also have multiple AAdvantage accounts and, as AAdvantage members, they were fully notified and apprised of the key rules of the AAdvantage program set forth herein.

The Defendants' Common Schemes

26. Since at least 1986, defendants individually and collectively have engaged in schemes to purchase AAdvantage mileage awards from AMERICAN's AAdvantage member-customers; to sell the wrongfully purchased AAdvantage awards to AMERICAN's customers and potential customers, all without compensation to AMERICAN; knowing that under the explicit AAdvantage rules that govern AMERICAN's relationship with its AAdvantage member-customers, neither AAdvantage mileage nor travel awards may be purchased, bartered or sold, and that mileage and travel awards are void if transferred for cash or other consideration; and to purchase and resell AAdvantage award certificates that have been acquired through computer fraud, theft and deception.

Defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN have carried out this scheme in part through their ownership and/or control of a variety of entities, corporate and otherwise, including but not limited to defendants PLATINUM and COUPON CONNECTION, as well as TEXAS TRAVELER (hereinafter collectively the "Controlled Entities").

27. To carry out these schemes, AMERICAN alleges that defendants, sometimes acting through the Controlled Entities, have done, and continue to do, the following:

(a) Induce AMERICAN's AAdvantage member-customers (i) to request from AMERICAN award certificates by designating in writing a name and travel plan that defendants supply, concealing from AMERICAN that they intend to sell said certificates to defendants and (ii) to sell their AAdvantage awards to defendants, in violation of the AAdvantage rules.

(b) Induce AMERICAN's customers and potential customers to purchase air transportation from defendants rather than from AMERICAN in violation of the AAdvantage rules.

(c) Induce AMERICAN's customers and potential customers to purchase air transportation from defendants rather than from AMERICAN by falsely and fraudulently misrepresenting that defendants' wrongfully obtained AAdvantage certificates and tickets can be purchased and sold.

(d) Aid and assist persons who purchase such tickets in wrongfully obtaining air transportation on AMERICAN by instructing them (i) to conceal from representatives of AMERICAN that they have purchased the AAdvantage award ticket, and (ii) to misrepresent to AMERICAN the manner in which they obtained the ticket (*e.g.*, to state that the AAdvan-

tage ticket was a gift, rather than revealing that it was purchased) if they are questioned by an AMERICAN representative.

(e) Aid and assist persons who purchase such tickets that have been issued in names other than their own wrongfully to obtain air transportation on AMERICAN by instructing them to misrepresent to AMERICAN that they are the person whose name appears on the AAdvantage award ticket, in some cases providing such persons with false identification documents to present to AMERICAN representatives.

(f) Induce AMERICAN's authorized travel agents to purchase from defendants fraudulently procured AAdvantage awards for resale to AMERICAN passengers without compensation to AMERICAN and in violation of AMERICAN's contract with the travel agents and the AAdvantage rules.

(g) Purchase and resell AAdvantage certificates that have been obtained based upon mileage credits stolen from AMERICAN.

FIRST CLAIM FOR RELIEF

(Tortious Interference
Against All Defendants)

28. AMERICAN repeats the allegations of Paragraphs 1 through 27 with the same force and effect as if fully set forth herein.

29. The AAdvantage rules govern the use of AAdvantage mileage credits and define the economic relationship between AMERICAN and members of the AAdvantage program.

30. AMERICAN alleges that defendants knew that the AAdvantage rules prohibit the purchase, sale or barter of AAdvantage mileage and awards.

31. AMERICAN alleges that defendants have paid and continue to pay money to induce AAdvantage members to violate the AAdvantage rules by selling to defendants AAdvantage awards. Annexed hereto as Exhibit A is a true and correct copy of COUPON CONNECTION's promotional materials, in which it admits that it "buy[s] . . . Frequent Flyer Awards."

32. AMERICAN alleges that defendants have sold and continue to sell such wrongfully-obtained certificates for air transportation on AMERICAN to AMERICAN's passengers without any compensation to AMERICAN and in violation of the AAdvantage rules.

33. As a result of the foregoing, defendants wrongfully and intentionally interfered and continue to interfere with AMERICAN's business and economic relationship with its Advantage member-customers and the AAdvantage program. In consequence thereof, AMERICAN has been wrongfully deprived of the very economic benefits that the AAdvantage program was carefully crafted to ensure, including passenger loyalty and revenues.

34. As a result of defendants' tortious interference, AMERICAN has suffered damages in an amount in excess of $10,000.

35. The foregoing actions of defendants were willful and malicious and AMERICAN is therefore entitled to an award of punitive or exemplary damages.

SECOND CLAIM FOR RELIEF

(Tortious Interference
Against All Defendants)

36. AMERICAN repeats the allegations of Paragraphs 1 through 27 and 29 through 33 with the same force and effect as if fully set forth herein.

37. AMERICAN has valid contracts with its authorized travel agents which require that the travel agents sell

AMERICAN's tickets and services in accordance with AMERICAN's rules.

38. AMERICAN alleges, upon information and belief, that defendants knew of AMERICAN's contract with its authorized travel agents and that the travel agents are required to comply with AMERICAN's rules, including the AAdvantage rules.

39. AMERICAN alleges, upon information and belief, that defendants wrongfully and intentionally interfered with AMERICAN's business and economic relationships with travel agents authorized to issue tickets for travel on AMERICAN by intentionally inducing them to purchase from defendants wrongfully procured AAdvantage awards for resale to AMERICAN pasengers without compensation to AMERICAN and in violation of AMERICAN's contract with the travel agents and the AAdvantage rules. By way of example, annexed hereto as Exhibit B are true and correct copies of defendant CHRISTENSEN's letter to one such travel agent, IBA Travel, and defendant COUPON CONNECTION's promotional materials distributed to travel agents.

40. As a result of defendants' tortious interference, AMERICAN has suffered damages in an amount in excess of $10,000.

41. The foregoing actions of defendants were willful and malicious and AMERICAN is therefore entitled to an award of punitive or exemplary damages.

THIRD CLAIM FOR RELIEF

(Tortious Interference
Against All Defendants)

42. AMERICAN repeats the allegations of Paragraph 1 through 27, 29 through 33 and 37 through 39 with the same force and effect as if fully set forth herein.

43. As a further result of the foregoing, defendants wrongfully and intentionally interfered and continue to

interfere with AMERICAN's business and economic relationship with customers who defendants and their co-conspirators have induced to purchase AAdvantage travel awards from defendants instead of purchasing commercial tickets from AMERICAN. Defendants thereby caused and continue to cause AMERICAN to provide free and discount air travel, thus depriving AMERICAN of the opportunity to sell tickets to and derive revenues from such passengers. Hence, revenues that should properly have been received by AMERICAN for transporting such passengers have been and are wrongfully diverted to defendants.

44. As a further result of the foregoing, defendants wrongfully and intentionally interfered and continue to interfere with AMERICAN's business and economic relationship with its AAdvantage customers who comply with the rules of the AAdvantage program, when these customers seek to travel on AMERICAN, either by purchasing a ticket or by redeeming the AAdvantage awards they have earned, but cannot obtain tickets or services on AMERICAN because of passengers who travel on award tickets wrongfully secured through defendants and who produce no revenue to AMERICAN, occupying seats that AMERICAN has needed and continues to need to accommodate its AAdvantage customers. Hence, AMERICAN is deprived of the revenues it would receive by selling tickets to such AAdvantage customers, and/or the customer loyalty and resultant economic benefits the AAdvantage program was carefully crafted to ensure.

45. As a further result of the foregoing, defendants wrongfully and intentionally interfered and continue to interfere with AMERICAN's business and economic relationship with other customers who desire to fly on AMERICAN, who cannot obtain tickets or services on AMERICAN because passengers who travel on tickets secured through defendants' scheme and who produce no revenue to AMERICAN are occupying the seats AMERICAN needs to accommodate these customers. Hence,

AMERICAN is deprived of the ability to sell tickets and to derive revenue from these customers.

46. As a further result of the foregoing, defendants wrongfully and intentionally interfered with AMERICAN's business and economic relationship with its authorized travel agents who comply with the AAdvantage rules, by intentionally reducing said agents' opportunities to market tickets for travel on AMERICAN, thereby depriving AMERICAN of opportunities to sell tickets on its airline through such travel agents.

47. Defendants, and each of them, knowing of AMERICAN's valuable economic relationships as set forth herein, have willfully, intentionally, and improperly interfered with and disrupted these relationships by the improper means and scheme described above, all with the wrongful purpose and effect of converting to themselves economic benefits belonging to AMERICAN.

48. As a result of the foregoing intentional interference with AMERICAN's economic relations by defendants, and each of them, AMERICAN has been damaged in an amount in excess of $10,000.

49. The foregoing actions of defendants were willful and malicious and AMERICAN is therefore entitled to an award of punitive or exemplary damages.

FOURTH CLAIM FOR RELIEF

(Conspiracy to Commit Fraud and
Aiding and Abetting Fraud Against All Defendants)

50. AMERICAN repeats the allegations of Paragraphs 1 through 27, 29 through 33, 37 through 39 and 43 through 47 with the same force and effect as if fully set forth herein.

51. AMERICAN alleges that, as more specifically set forth in Paragraphs 52 through 58, since at least 1986 defendants and others, individually and in combination

and conspiracy between and among themselves and sometimes acting through the Controlled Entities, have formulated, agreed upon, and carried out a common scheme to defraud AMERICAN of money and valuable services (a) by aiding and abetting and inducing AAdvantage members and others in fraudulently obtaining and redeeming AAdvantage awards; (b) by fraudulently procuring and offering for sale AAdvantage award certificates which may be redeemed for free and discount travel on AMERICAN; and (c) by advising the purchasers of such fraudulently obtained AAdvantage awards to make material misrepresentations to AMERICAN.

52. AMERICAN alleges that defendants and others, individually and in combination and conspiracy between and among themselves, have paid and continue to pay money to induce AAdvantage members fraudulently to obtain AAdvantage award certificates for sale to defendants by concealing from AMERICAN their intention to sell the AAdvantage certificates in violation of the AAdvantage rules. AMERICAN alleges that said transactions include, but are not limited to, those set forth in Exhibit C, which is expressly incorporated in this Paragraph as if set forth in full.

53. AMERICAN alleges that in furtherance of the foregoing scheme and unbeknownst to AMERICAN, defendants aided, assisted and induced AAdvantage members fraudulently to obtain AAdvantage award certificates to sell to defendants by instructing them to conceal from AMERICAN their intention to sell the certificates and by supplying said AAdvantage members with the names and travel plans of defendants' customers who were to purchase AAdvantage certificates and award tickets and instructing them to request AAdvantage certificates from AMERICAN as alleged herein.

54. AMERICAN, in reasonable reliance upon the above-described false and fraudulent representations, did issue the AAdvantage award certificates so requested.

55. AMERICAN alleges that defendants purchased and continue to purchase the fraudulently obtained AAdvantage award certificates and exchanged them or caused them to be exchanged and continue to exchange them and cause them to be exchanged for tickets for air transportation on AMERICAN; further, defendants resold and continue to resell such award certificates to travel agents and to potential customers of AMERICAN, in violation of the AAdvantage rules and without compensation to AMERICAN. American alleges that said sales include, but are not limited to, sales to the following individuals: Sharon Lombardo, in or about July 1987; Don Cotter, in or about July 1987; Laurel Sindelay, in or about July 1987; Deidre Gruendler, in or about July 1987; Tracy Peterson, in or about March 1987; Craig Joslyn, in or about March 1987; Armando Juarez, in or about March 1987; Norman Soule, on or about March 1988; and George Vitale, in or about April 1988.

56. AMERICAN alleges that defendants aided and assisted and continue to aid and assist, and induced and continue to induce, such purchasers of the fraudulently procured tickets to obtain transportation on AMERICAN by instructing them to conceal from representatives of AMERICAN the fact that they purchased said tickets. Annexed hereto as Exhibit C is a true and correct copy of TEXAS TRAVELER's instructions to its customers, which instruct them:

> "[D]o not mention to any airline representative that you purchased this ticket. . . ."

Said materials advise the customer of the name and hometown of the AAdvantage member who procured the award upon which the customer's tickets are based, and warns the customer as follows:

> "Please memorize this information for your protection. *DO NOT SHOW THIS CARD TO THE AIRLINE.*"

57. AMERICAN alleges that defendants further aided and assisted and continue to aid and assist, and induced and continue to induce, such purchasers of the fraudulently obtained tickets to obtain transportation on AMERICAN by instructing them to misrepresent to AMERICAN the manner in which they obtained their tickets—*i.e.*, to state that they had received them as gifts, rather than the true fact that they were purchased —if questioned by an AMERICAN representative.

58. AMERICAN alleges, upon information and belief, that defendants have supplied some purchasers with fraudulently obtained tickets that were issued in names other than their own, and aided and assisted such purchasers in fraudulently obtaining air transportation on AMERICAN, by instructing them to misrepresent their identity to AMERICAN. Upon information and belief, defendants provided some such persons with false identification documents to present to AMERICAN representatives. AMERICAN alleges, as but one example of such wrongful conduct, that in or about June 1987 defendants aided and assisted passenger Peter Rozier of Mt. Sterling, Missouri in fraudulently obtaining air transportation on AMERICAN from St. Louis, Missouri to Honolulu by providing him with an AMERICAN ticket in the name of George Noga and an identification card bearing the name of George Noga but displaying Peter Rozier's photograph. AMERICAN alleges that TEXAS TRAVELER fraudulently obtained said ticket based upon an AAdvantage award certificate procured by and purchased from AAdvantage member George Noga and sold by TEXAS TRAVELER to Peter Rozier's father-in-law, William Prang.

59. As a result of the foregoing conspiracy to commit fraud, including defendants' actions in aiding and abetting and inducing fraud as described herein, defendants and their co-conspirators wrongfully caused AMERICAN to provide free or discount air transportation to passengers who were not entitled to such travel, and AMERI-

CAN lost the opportunity to sell tickets and services on its airline to those who purchased fraudulently obtained tickets from defendants and to its AAdvantage customers and other customers who could not secure seats on AMERICAN flights because they were reserved for purchasers of fraudulently obtained tickets. AMERICAN also lost the opportunity to sell tickets through travel agents who purchased fraudulently obtained tickets from defendants, as well as travel agents who comply with the AAdvantage rules and lose opportunities to sell legitimate tickets for AMERICAN.

60. As a result of the foregoing conspiracy to commit fraud, including defendants' wrongful actions in aiding and abetting fraud as described herein, AMERICAN has suffered damages in an amount in excess of $10,000.

61. AMERICAN alleges, upon information and belief, that the foregoing actions of defendants were willful and malicious and AMERICAN is therefore entitled to an award of punitive or exemplary damages.

FIFTH CLAIM FOR RELIEF

(Unfair Competition Against All Defendants)

62. AMERICAN repeats the allegations of Paragraphs 1 through 27, 29 through 33, 37 through 39, 43 through 47 and 51 through 59 with the same force and effect as if fully set forth herein.

63. The defendants have been and are engaged in a business which is predicated on willful circumvention and violation of the AAdvantage rules and whose purpose is to misappropriate profits at AMERICAN's expense by improperly selling travel on AMERICAN flights to AMERICAN passengers without any compensation to AMERICAN.

64. AMERICAN alleges that defendants have operated and continue to operate said business by means of a pervasive pattern of dishonesty and unfair means as herein alleged and which includes the following wrongful acts:

(a) Paying AAdvantage members to induce them to violate the AAdvantage rules.

(b) Inducing AAdvantage members to conceal material facts from AMERICAN, which concealment is indispensable to defendants' unlawful scheme.

(c) Selling AAdvantage awards, redeemable for travel on AMERICAN flights, in violation of the AMERICAN AAdvantage rules.

(d) Inducing and directing purchasers of the wrongfully-sold AMERICAN awards to conceal the source of the tickets, and if necessary to lie in response to AMERICAN's inquiries and thereby avoid detection, all of which is essential to defendants' campaign to misappropriate revenues from AMERICAN based on systematic violations of the AAdvantage rules.

(e) Purchasing and reselling AAdvantage certificates that have been obtained based upon mileage credits stolen from AMERICAN.

65. The foregoing pattern of unfair and dishonest conduct and misappropriation constitutes unfair competition.

66. As a result of defendants' wrongful conduct AMERICAN has suffered damages in excess of $10,000.

67. The foregoing actions of defendants were willful and malicious and AMERICAN is therefore entitled to an award of punitive or exemplary damages.

SIXTH CLAIM FOR RELIEF

(Pattern of Unlawful Activity Violations Against CARLSON, BRIGGS, BAUMAN and CHRISTENSEN)

68. AMERICAN repeats the allegations of Paragraphs 1 through 27, 29 through 33, 37 through 39, 43 through

47, 51 through 59 and 63 through 65 as though fully set forth herein.

69. This claim arises under the Pattern of Unlawful Activity Act ("PUAA"), Utah Code Ann. §§ 76-10-1601, *et seq.*, and particularly Utah Code Ann. § 76-10-1605.

70. Defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN are each a "person" capable of holding a legal or beneficial interest in property within the meaning of Utah Code Ann. § 76-10-1602(4).

71. COUPON CONNECTION was and is a partnership in continuing operation and an "enterprise" within the meaning of Utah Code Ann. § 76-10-1602(2).

72. PLATINUM was and is a corporation in continuing operation and an "enterprise" within the meaning of Utah Code Ann. § 76-10-1602(2).

73. TEXAS TRAVELER was and is a corporation in continuing operation and an "enterprise" within the meaning of Utah Code Ann. § 76-10-1602(2).

74. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, with specific intent to defraud AMERICAN, in addition to acquiring AAdvantage awards and certificates by wrongly inducing AAdvantage members to sell their award certificates to them as alleged herein, also acquired AAdvantage award certificates from Gayle Schreier and Irwin Schreier of Tulsa, Oklahoma, who had obtained such certificates through computer fraud, theft and deception, and who have been indicted in the Northern District of Oklahoma as a consequence of their unlawful conduct. These individuals are hereinafter referred to as "indicted individuals."

75. AMERICAN alleges that the indicted individuals, with specific intent to defraud AMERICAN, through an elaborate and sophisticated scheme:

(a) Supplied AMERICAN with false and fraudulent information such as fictitious names and addresses for the purpose of inducing AMERICAN to issue AAdvantage account numbers for accounts which defendants would control. Said accounts include, but are not limited to, those set forth in Exhibit D, which is expressly incorporated in this Paragraph as if set forth in full.

(b) Unlawfully accessed AMERICAN's computer system by utilizing the personal computer access code of an authorized AMERICAN travel agent or agents, for the purpose of altering passenger records so as to include false and fraudulent information. Specifically, passenger records of AMERICAN's non-AAdvantage passengers were altered in one or more of the following ways: an AAdvantage account number controlled by the indicted individuals was added; a mail drop controlled by the indicted individuals was added; the name or other identifying information of a bona fide passenger was altered to correspond to the name appearing on an AAdvantage account controlled by the indicted individuals. The passenger records so altered include, but are not limited to, those set forth in Exhibit E, which is expressly incorporated in this Paragraph as if set forth in full.

(c) Utilized the stolen mileage credits by submitting to AMERICAN AAdvantage award claim forms completed with AAdvantage numbers for fraudulent accounts, AAdvantage mileage that was not really flown, and the fictitious AAdvantage members' signatures. Defendants submitted these forms with the intention and for the purpose of inducing AMERICAN to mail to the indicted individuals at mail drop addresses certificates redeemable for free and discount travel

on AMERICAN. The fraudulent mail drops that the indicted individuals used and supplied to AMERICAN include, but are not limited to, those set forth in Exhibit F, which is expressly incorporated in this Paragraph as if set forth in full.

(d) Redeemed and caused to be redeemed the fraudulently acquired award certificates for tickets on AMERICAN flights, and marketed and sold the award certificates to travel agents and coupon brokers including defendants, and to customers and potential customers of AMERICAN, without compensation to AMERICAN and in violation of the AAdvantage rules.

76. AMERICAN alleges that between approximately September 1, 1987 and March 1, 1988, defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, with specific intent to defraud AMERICAN, paid the indicted individuals more than $50,000 for numerous AAdvantage certificates which were based on stolen AMERICAN mileage credits.

77. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, received the certificates knowing them to be based on AMERICAN mileage credits they knew to be stolen or believed probably had been stolen, within the meaning of Utah Code Ann. § 76-6-408.

78. AMERICAN alleges, upon information and belief, that, on more than three separate occasions, defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, with specific intent to defraud AMERICAN, received and disposed of the AAdvantage certificates that were based on stolen AMERICAN mileage credits, in violation of Utah Code Ann. § 76-6-408.

79. The violations of Utah Code Ann. § 76-6-408 set forth herein each were related to and in furtherance of the scheme of the indicted individuals and defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN to defraud AMERICAN, and had and continue to have the same or similar purposes, results, participants and/or methods of commission, constituting continuing unlawful conduct and forming a pattern of unlawful activity within the meaning of Utah Code Ann. § 76-10-1602(3).

80. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, acquired and/or maintained interests in and control of PLATINUM through the pattern of unlawful activity described herein.

81. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, were associated with PLATINUM from at least approximately September 1, 1987 until March 1, 1988 and conducted and participated in PLATINUM's activities through the pattern of unlawful activity described herein.

82. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, acquired and or maintained interests in and control of COUPON CONNECTION through the pattern of unlawful activity described herein.

83. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, were associated with COUPON CONNECTION from at least approximately September 1, 1987 until March 1, 1988 and conducted and participated in COUPON CONNECTION's activities through the pattern of unlawful activity described herein.

84. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN

and CHRISTENSEN, and each of them, acquired and/or maintained interests in and control of TEXAS TRAVELER through the pattern of unlawful activity described herein.

85. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, were associated with TEXAS TRAVELER from at least September 1, 1987 until March 1, 1988 and conducted and participated in TEXAS TRAVELER's activities through the pattern of unlawful activity described herein.

86. As a direct and proximate result of the above-described violations of Utah Code Ann. § 76-10-1603(2) and (3), AMERICAN has been injured in its business and property in an amount in excess of $10,000, and is entitled to two times its damages, plus costs including reasonable attorneys fees, pursuant to Utah Code Ann. § 76-10-1605.

SEVENTH CLAIM FOR RELIEF

(Racketeering Influenced and Corrupt Organizations Violation Against CARLSON, BRIGGS, BAUMANN and CHRISTENSEN)

87. AMERICAN repeats the allegations of Paragraphs 1 through 27, 29 through 33, 37 through 39, 43 through 47, 51 through 59, 63 through 65 and 69 through 85 as though fully set forth herein.

88. This claim arises under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and particularly 18 U.S.C. § 1964(c).

89. Defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN are each a "person" capable of holding a legal or beneficial interest in property within the meaning of 18 U.S.C. § 1961(3).

90. PLATINUM was at all relevant times an "enterprise" within the meaning of 18 U.S.C. § 1961(4), in

continuing operation, which is engaged in, and whose activities affect, interstate commerce.

91. TEXAS TRAVELER was at all relevant times an "enterprise" within the meaning of 18 U.S.C. § 1961(4), in continuing operation, which is engaged in, and whose activities affected, interstate commerce.

92. COUPON CONNECTION was at all relevant times an "enterprise" within the meaning of 18 U.S.C. § 1961(4), in continuing operation, which is engaged in, and whose activities affected, interstate commerce.

93. AMERICAN alleges that in furtherance of the scheme to defraud described herein, defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, conspired and combined with the indicted individuals, who, in furtherance of the conspiracy, committed at least two acts indictable under 18 U.S.C. § 1343, including:

> Between 1986 and February 1, 1988 with the specific intent to defraud AMERICAN, making or causing to be made at least 500 telephone-linked computer communications from Tulsa, Oklahoma to AMERICAN's SABRE computer facilities in Tulsa, Oklahoma, transmitting fraudulent alterations to existing passenger name records including false names, addresses and AAdvantage numbers, for the purpose of stealing mileage credits from AMERICAN and transferring them to defendants' control as set forth in Paragraph 75 the false information so entered into the computer was thereafter transmitted by wire into interstate commerce to the AAdvantage computer in Fort Worth, Texas. Such transmissions include, but are not limited to, those set forth in Exhibit E, which is expressly incorporated in this Paragraph as if set forth in full.

94. AMERICAN alleges that in furtherance of the scheme to defraud described herein, defendants CARL-

SON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, combined and conspired with the indicted individuals, who, in furtherance of the conspiracy, committed at least two acts indictable under 18 U.S.C. § 1341, including:

(a) Between 1986 and February 1, 1988, with the specific intent to defraud AMERICAN, causing at least 500 fraudulent AAdvantage award claim forms to be mailed to AMERICAN at the AMERICAN post office box in Dallas/Fort Worth listed on the AAdvantage Awards Claim, which mailings were intended to induce AMERICAN to issue AAdvantage award certificates to defendants based upon stolen mileage credits as set forth in Paragraph 75.

(b) Between 1986 and February 1, 1988, with the specific intent to defraud AMERICAN, causing AMERICAN to mail at least 500 AAdvantage award certificates based upon stolen mileage credits to mail drops including but not limited to those set forth in Exhibit F, which is expressly incorporated in this Paragraph as if set forth in full, as set forth in Paragraph 75.

95. AMERICAN alleges, upon information and belief, that in furtherance of the scheme to defraud described herein defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, conspired and combined with the indicted individuals, who in furtherance of the conspiracy, committed additional acts indictable under 18 U.S.C. §§ 1341 and 1343.

96. Each separate use of the United States mails and of interstate telephone and other wire communications in furtherance of the scheme of the indicted individuals and defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN to defraud AMERICAN as described herein constitutes an act of racketeering activity within the meaning of 18 U.S.C. § 1961(1)(B).

97. The violations of 18 U.S.C. §§ 1341 and 1343 set forth in Paragraphs 93-95 each were related to and in furtherance of the scheme of the indicted individuals and defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN to defraud AMERICAN, and constitute continuous and related racketeering activity forming a pattern of racketeering activity within the meaning of 18 U.S.C. § 1961(5).

98. AMERICAN alleges that defendants CARLSON, BRIGGS, BAUMANN anud CHRISTENSEN, and each of them, acquired and/or maintained interests in and control of PLATINUM through the pattern of racketeering activity described herein.

99. AMERICAN alleges that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, were associated with PLATINUM from at least 1986 until February 1, 1988 and conducted and participated in PLATINUM's activities through the pattern of racketeering activity described herein.

100. AMERIAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, acquired and/or maintained interests in and control of COUPON CONNECTION through the pattern of racketeering activity described herein.

101. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, were associated with COUPON CONNECTION from at least approximately 1986 until February 1, 1988, and conducted and participated in COUPON CONNECTION's activities through the pattern of racketeering activity described herein.

102. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, acquired and/or

maintained interests in and control of TEXAS TRAVELER through the pattern of racketeering activity described herein.

103. AMERICAN alleges, upon information and belief, that defendants CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, and each of them, were associated with TEXAS TRAVELER from at least 1986 until February 1, 1988, and conducted and participated in TEXAS TRAVELER's activities through the pattern of racketeering activity described herein.

104. As a direct and proximate result of the above-described violations of 18 U.S.C. § 1962(b) and (c), AMERICAN has been injured in its business and property in an amount in excess of $10,000, and is entitled to three times its damages, plus costs including a reasonable attorney's fees, pursuant to 18 U.S.C. § 1964(c).

EIGHTH CLAIM FOR RELIEF

(Injunctive Relief Against all Defendants)

105. AMERICAN repeats the allegations of Paragraphs 1 through 27, 29 through 33, 37 through 39, 43 through 47, 51 through 59, 63 through 65, 69 through 85, and 88 through 103 as though fully set forth herein.

106. AMERICAN alleges that defendants, and each of them, are now acting and will continue to act in furtherance of the schemes alleged herein. More particularly, AMERICAN believes that defendants, sometimes acting through the Controlled Entities, are continuing and will continue to solicit AAdvantage members to sell their AAdvantage mileage award certificates and tickets in violation of the AAdvantage rules; they are continuing and will continue to solicit passengers to buy such AAdvantage mileage award certificates and tickets in violation of the AAdvantage rules; and they are continuing and will continue to encourage the passengers to conceal and misrepresent the source of their AAdvantage tickets.

107. The actions of defendants, and each of them, as herein described, have caused, and are continuing to cause, irreparable harm to AMERICAN. Specifically, defendants' actions deprive AMERICAN of the very economic benefits the AAdvantage program was crafted to ensure. They also adversely affect AMERICAN's relationships with its AAdvantage member-customers and other customers, AMERICAN's ability to develop customer loyalty, and AMERICAN's reputation in the travel industry.

108. The actions of defendants, and each of them, as herein described, have caused and are continuing to cause AMERICAN to suffer damages in an amount which, particularly in light of defendants' efforts to conceal their misconduct, is extremely difficult to calculate and for which money damages will not provide an adequate remedy. AMERICAN has no adequate remedy at law.

109. For the foregoing reasons, AMERICAN is entitled to preliminary and financial injunctive relief against defendants, and each of them, as follows:

(a) Prohibiting defendants, and each of them, acting directly or indirectly or acting through entities which they control directly or indirectly, from soliciting or purchasing AAdvantage mileage certificates and/or tickets from AAdvantage members;

(b) Prohibiting defendants, and each of them, acting directly or indirectly or acting through entities which they control directly or indirectly, from offering for sale free or reduced rate transportation based in whole or in part on AAdvantage award mileage or certificates; and

(c) Prohibiting defendants, and each of them, acting directly or indirectly or acting through entities which they control directly or indirectly,

from issuing or causing to be issued tickets for free or reduced rate transportation based in whole or in part on AAdvantage mileage or certificates.

Prayer for Relief

WHEREFORE, plaintiff AMERICAN AIRLINES, INC. requests that judgment be entered as follow:

1. Awarding AMERICAN damages as against all defendants, jointly and severally, in amount in excess of $10,000, on the First Claim for Relief.

2. Awarding AMERICAN damages as against all defendants, jointly and severally, in an amount in excess of $10,000, on the Second Claim for Relief.

3. Awarding AMERICAN damages as against all defendants, jointly and severally, in an amount in excess of $10,000, on the Third Claim for Relief.

4. Awarding AMERICAN damages as against all defendants, jointly and severally, in an amount in excess of $10,000, on the Fourth Claim for Relief.

5. Awarding AMERICAN damages as against all defendants, jointly and severally, in an amount in excess of $10,000, on the Fifth Claim for Relief.

6. Awarding AMERICAN two times an amount in excess of $10,000 against CARLSON, BRIGGS, BAUMANN and CHRISTENSEN jointly and severally, on the Sixth Claim for Relief.

7. Awarding AMERICAN three times an amount in excess of $10,000 as against CARLSON, BRIGGS, BAUMANN and CHRISTENSEN, jointly and severally, on the Seventh Claim for Relief.

8. Awarding AMERICAN punitive damages as against all defendants, jointly and severally, in the amount of $5 million.

9. Granting an injunction against the defendants and all those acting by, through, or in concert with them, enjoining them from engaging, directly or indirectly, in the purchase, sale, barter or brokering of plaintiff's frequent flyer bonus mileage, certificates, or tickets based on such bonuses and certificates.

10. Awarding AMERICAN its reasonable attorney fees herein.

11. Awarding AMERICAN its costs of suit herein.

12. Granting AMERICAN such other and further relief as is just and proper.

Dated: August 31, 1988

SUITTER AXLAND ARMSTRONG
& HANSON
LEROY S. AXLAND, ESQ.

WEIL, GOTSHAL & MANGES
CARLA A. HILLS, ESQ.
RICHARD A. ROTHMAN, ESQ.

By /s/ Leroy S. Axland
Attorneys for Plaintiff
American Airlines, Inc.

Plaintiff's Address:

4200 American Boulevard 4C27
Ft. Worth, Texas 76155

EXHIBIT A

COUPON
CONNECTION
From Here To There For Less

PROUDLY ANNOUNCES

OUR SECOND GIVE A TRIP FOR THE HOLIDAYS SPECIAL

Save $$$ on roundtrip coach fares—Order Now—Fly Later. Here is a copy of the specials currently being offered:

LOW LOW **COACH ROUNDTRIP PRICES**

Order Before 12/23/85 & SAVE $

All Flights are on Regularly Scheduled Major Airlines (fly after 2-1-86)

SLC to HAWAII	349.00
SLC to ANCHORAGE or FAIRBANKS	399.00
SLC to SAN JUAN	349.00
SLC to CARIBBEAN	349.00
SLC to MANY U S. CITIES	279.00
SLC to LONDON	625.00

ORDER NOW FOR SPRING & SUMMER TRAVEL

roundtrip coach fares good this fall & winter

SLC to HAWAII	449.00
SLC to MANY WEST & MIDWEST CITIES	279.00
SLC to NEW ORLEANS & FLORIDA stand by	199.00

International fares coach roundtrip

SLC to LONDON	649.00
SLC to PARIS	649.00
SLC to FRANKFURT	649.00

As our valued customer, we offer an additional $10.00 per ticket off the above prices when you bring in this ad and pay by cash or check. Limit of 4 discounts per ad. Flights originating in cities other than Salt Lake City could be slightly higher, please call for exact prices.

******SPECIAL NOTE for the Frequent Flyer. Enjoy the service & comfort of FIRST CLASS for $150.00 over most Domestic, Hawaiian & Caribbean airline coach prices. We also have first class prices on many European, Far East & South Pacific Destinations for about ½ of the regular airline first class prices.******

CALL US before you fly—We could save you $$$. Remember we also buy your Frequent Flyer Awards.

EXHIBIT B

ORTHOPEDIC TECHNOLOGY INC.

ORTHOPEDIC VENTILATION INC.

10101 South State Street
Sandy, Utah 84070

VENT-A-CAST

Randall M. Christensen M.D.R.
President • Researchist

Robert J. Baumann
Chairman

Owner/General Manager
I B A Travel
3330 S. 700 E.
Salt Lake City, Utah

Re: Discount Airfare.

This letter is to introduce to you a very special money-making offer. I'm a business consultant specializing in negotiations and project viability studies. I also manage businesses; hence, the odd stationery.

I was recently retained to move some excess first class upgrades on American Airline. These have very large profit structures built in for anyone who wants to take advantage of this offering. The pertinent facts are as follows:

1. Each certificate is good for round trip upgrade to first class on any domestic, United States, Caribbean, Hawaii, or Mexican destination served by American Airline.

2. Each certificate is transferable but takes one to two weeks for the airline to process and return, which my client is willing to do as part of the deal.

3. These certificates are good through 5/31/86.

4. The best coach fare to say—Montego Bay, Jamaica is currently $ 467.00
First class fare is 1976.00
meaning the certificate is worth 1509.00
in savings which if you wanted you could charge your customers.

5. Your cost for these certificates while they last is only $110.00, which means you can sell them to your clients for whatever you can get out of them or for only $150.00 and still make $40.00 profit plus the airline pays you $20.00 to ticket these certificate making a total of $60.00 profit per certificate, *minimum!*

I hope this offer interests you and that we can start a mutually profitable relationship. I quite frequently have these types of discount airfares and would prefer to move them locally instead of, as in the past, to New York, Los Angeles, and Chicago. If you are interested call now as I can only offer these for as long as they last. Thanks for your time and interest.

Profitably Yours,

/s/ Randy Christensen
RANDY CHRISTENSEN
President

COUPON CONNECTION

From Here To There For Less

TRAVEL AGENTS

Let COUPON CONNECTION add a valuable tool to aid you in dealing with your established clients & attracting new customers!

SEND THEM FIRST CLASS TO MANY U.S. & CARIBBEAN DESTINATIONS,

for $150.00 more than any available COACH fare. Pass this LOW price along to impress and endear your clients or mark it up for EXTRA PROFITS to you and your agency.

These upgrades require a minimum of 2 weeks to be issued in your clients name.

COUPON CONNECTION ALSO HAS LOW FIRST CLASS AND COACH ROUND TRIP PRICES!

See the attached mailer we are sending to our regular customers for price examples, in most cases we can discount these prices to a wholesale level for a savings of approximately $25.00 more.

Again you have the flexibility to sell these at any price the traffic will bear for added profitability and to make you a hero with your customers in the competitive travel marketplace.

Contact us to find out how what we can do can help you with what you do.

Or we will be giving you a call in the near future to introduce ourselves and see if we can be of service.

EXHIBIT C

EXAMPLES OF AWARDS PURCHASED FROM AADVANTAGE MEMBERS

AAdvantage Member	AAdv. #	Broker	Date
Catherine Martin	X116892	Texas Traveler	April 1988
Bruce Roberson	S734130	Texas Traveler	March 1988
Gary Mike Rockhold	KR39062	Texas Traveler	February 1988
George Noga	H283304	Texas Traveler	June 1987
Sabrina L. Spangler	W474954	Texas Traveler	June 1986
Charles Deloach	U998816	Coupon Connection	1987
Mohsen Khusrowshaki	AK17952	Coupon Connection	1987
Craig W. Schaeffer	F319264	Coupon Connection	1987

EXHIBIT D

AADVANTAGE ACCOUNTS

AAdvantage Number	Purported AAdvantage "Member"	Mail Drop
KF43564	W. Wilson	1515 South Quaker, #11 Tulsa Oklahoma
KF43588	G. Wilson	Same as above
KF43576	R. Wilson	Same as above
KF43590	J. Wilson	Same as above
KE75892	Stephen Adams	Same as above
KE75880	Michael Boden	Same as above
KE75830	Nathan Cupp	Same as above
KE75866	Sylvia Cupp	Same as above
KE75920	Edna Davis	Same as above.
LU78890	Magdalena Terrein	Same as above
LH53726	A. Simonini	Same as above
LJ49506	Judith Jossett	Same as above
LU78876	Claudio Terrein	Same as above
KV75994	T. Smith	Irwin Schreier, d/b/a Environment Associates Box 110 5147 South Harvard Tulsa, Oklahoma
KV44300	A. Smith	Same as above
KV76190	H. Smith	Same as above
KV75878	G. Johnson	Same as above
KV44222	F. Johnson	Same as above
KV76242	K. Johnson	Same as above
KV44260	J. A. Jones	Same as above
KV76024	N. Jones	Same as above
KV76152	B. Jones	Same as above

EXHIBIT E

PNR ALTERATIONS

Date of Trans-mission	Original Passenger Name	Passenger Name Changed To	AAdvantage # Added	AAdvantage "Member"
02-16-87	Sheila Jones/ Richard Jones	R. Jones	KV17650	R. Jones 3511 S. Toledo Tulsa, OK
		P. Jones	KV77564	P. Jones 7955 E. 50th Suite 1361 Tulsa, OK
01-15-87	Ms. T. Jones	T. Jones	KV17674	T. Jones 3511 S. Toledo Tulsa, OK
01-17-87	Mr. LaWayne Jones	S. Wayne Jones	KV17662	S. Jones 3511 S. Toledo Tulsa, OK
02-17-87	David Jones	B. Jones	KV17686	B. Jones 3511 S. Toledo Tulsa, OK
02-15-87	Richard Crow	M. Wise	6361418	Mike Wise 3511 S. Toledo Tulsa, OK
02-01-87	Kathleen Johnson	K. Johnson	KV76242	K. Johnson 5147 S. Harvard Tulsa, OK
04-29-87	Donald Jones Patricia Jones	B. Jones	KH12764	H. Jones 2421 W. Pratt Blvd., Apt. 1072, Chicago, ILL
		P. Jones	KV77564	P. Jones 7955 E. 50th Suite 1361 Tulsa, OK
05-13-87	Essie Jones	E. Jones	KH12790	E. Jones 2421 W. Pratt Blvd., Apt. 1072, Chicago ILL

Date of Transmission	Original Passenger Name	Passenger Name Changed To	AAdvantage # Added	AAdvantage "Member"
06-22-87	Mr./Mrs. Schweizer	C. Jones	KH12804	C. Jones 2421 W. Pratt Blvd., Apt. 1072, Chicago ILL
		A. Jones	KU44260	A. Jones 5147 S. Harvard Suite 110 Tulsa, OK
06-22-87	E. Vatter	D. Jones	KH12816	D. Jones 2421 W. Pratt Blvd., Apt. 1072, Chicago ILL
06-22-87	Mr./Mrs. Decampe	T. Jones	KH12752	T. Jones 2421 W. Pratt Blvd., Apt. 1072, Chicago ILL
		C. Johnson	KH47972	C. Johnson 13230 Addison Sherman Oaks, California
01-17-87	Mrs. C. Smith/ MMR/GMR	H. Smith	KV76190	H. Smith 5147 S. Harvard Tulsa, OK
		C. Smith	KV17636	C. Smith 2027 S. Garnett Suite 101 Tulsa, OK
		N. Smith	KH33380	Nancy Smith P.O. Box 472244 Tulsa, OK
02-08-87	Wilber Smith	T. Smith		T. Smith 5147 S. Harvard Tulsa, OK
06-22-87	Mr. Reti	N. Jones	KV76024	N. Jones 5147 S. Harvard Tulsa, OK

Date of Transmission	Original Passenger Name	Passenger Name Changed To	AAdvantage # Added	AAdvantage "Member"
09-06-87	Mr. J. Metter	B. Jones	KV76152	B. Jones 5147 S. Harvard Tulsa, OK
01-19-87	Jennifer Johnson/ Lauren Nicholas	G. Johnson	KV75878	G. Johnson 5147 S. Harvard Tulsa, OK
		T. Johnson	KF43654	T. Johnson 28 W. 75th Suite 5A New York, NY
		F. Johnson	KU44222	F. Johnson 5147 S. Harvard Tulsa, OK
04-19-87	Kim Johnson	F. Johnson	KU44222	F. Johnson 5147 S. Harvard Tulsa, OK

EXHIBIT F

MAIL DROPS

Mail Drop	Established By
Retailers Program Design—Irwin Schreier/ Retailers Program 7955 East 50th Street Tulsa, Oklahoma	Irwin Schreier
Environmental Associates 5147 South Harvard Tulsa, Oklahoma	Irwin Schreier
International Gold Traders 2421 West Pratt Boulevard Suite 1072 Chicago, Illinois	Irwin Schreier
South African Platinum Associates 7739 East Broadway #146 Tuscon, Arizona 85710	Irwin Schreier
International Silver Consultants 4815 Trousdale Drive Nashville, Tennessee 37270	Irwin Schreier
Hastings Limited 5130 East Charleston Boulevard Suite 5-F Las Vegas, Nevada	Irwin Schreier
International Gold Consultants 1700 Stumpf Boulevard Suite 602 Gretna, Louisiana 70056	Irwin Schreier
Pollution Control Associates 17336 Harper Suite 10 Detroit, Michigan 48224	Irwin Schreier
Jones, Brown & Johnson Associates 3 Golf Center Suite 219 Boffman Estates, Illinois 60195	Irwin Schreier

South African Gold Consultants 110 Pacific Avenue Suite 216 San Francisco, California 94111	Irwin Schreier
German Import Associates 6620 Seidell Suite 170 San Antonio, Texas 78209	Irwin Schreier
Irwin Engineering Associates 2035 East 3300 South Suite 349 Salt Lake City, Utah 84109	Irwin Schreier
Goldman Importing Company Suite 315 12311 North East Gilsan Portland, Oregon	Irwin Schreier
Kruger, Goldman & Stein 7320 Southwest Bear-Hills Highway Suite 155 Portland, Oregon 97225	Irwin Schreier
Summit Engineering Associates Suite 173 5555 Zuni Road Southeast Albuquerque, N Mexico 87125	Irwin Schreier

AT977/14013.10/3-1

IN THE
DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

Civil No. 1988/177

P.S. TUCKER,

Plaintiff,

vs.

AMERICAN AIRLINES, INC.,

Defendant.

ORDER OF DISMISSAL

THIS MATTER is before the Court on motion of defendant American Airlines, Inc. to dismiss for *forum non conveniens*. Plaintiff P.S. Tucker failed to oppose the motion and, thus, we may deem the matter conceded pursuant to V.I. Code Ann. tit. 5, App. V Rule 6(i). We will, nevertheless, analyze briefly the basis for American's claim of *forum non conveniens*.[1]

The Virgin Islands have codified the common law doctrine of *forum non conveniens* at V.I. Code Ann. tit. 5, § 4905.

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just.

Id. In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the Supreme Court told us what factors should guide our discretion.

---

[1] There being no alternative federal forum, a motion to transfer, 28 U.S.C. § 1404, would have no basis.

> If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. . . . There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09.

Having considered American's motion we make the following findings.

1. Tucker seeks class certification to sue on behalf of all members of the AAdvantage program with similar claims who reside across the United States.

Thus, Texas would be a more central location in contrast to the remoteness of the Virgin Islands.

2. American's headquarters and its AAdvantage program office are located in Texas.

3. The program was conceived, implemented and is currently maintained in the Texas offices.

4. The alleged contract was entered into in either Texas or Connecticut.

5. Virtually all documents and witnesses necessary to the litigation are located in Texas.

6. Texas conflict-of-law laws are similar to that of the Virgin Islands. Restatement (Second) of Conflict of Laws, § 188 (1971); *Duncan v. Cessna Aircraft Co.*, 665 S.W. 2d 414 (Tex. 1984). Thus, regardless of whether the suit is prosecuted here or in Texas, it appears that Texas law will be applied.

7. A Texas state court would be in a better position to apply Texas law, than a federal district court in the Virgin Islands.

8. Texas state law on class certification mirrors Fed.R.Civ.P. 23 and, thus, Tucker's expectations in this regard should be met by a Texas court. Tex.R. Civ.P. Ann r. 42 (Vernon 1988); *Huddleston v. Western Nat'l Bank*, 577 S.W. 2d 778, 780 (Tex. Civ. App. 1979).

9. American questions Tucker's status as a Virgin Islands resident.[2]

It is apparent from the above that Texas offers an adequate alternative forum; that litigation in Texas will be

[2] American states that Tucker's mailing address for the AAdvantage program has been and continues to be Connecticut. Aff. of F. DiNuzzo, dated August 18, 1988, at 2. Tucker also does not have a Virgin Islands telephone listing, or any listing in the local property records. Aff. of E. Moore, dated August 15, 1988.

more convenient to both the defendant American and the potential plaintiff class of AAdvantage members; and that the law of the alternative forum is no less favorable to Tucker and the potential class, than the law of the chosen forum but is essentially the same.

Although the Court should be hesitant to disturb the plaintiff's choice of forum,[3] the balance of interests in this case clearly lies with American. American disputes Tucker's claimed status as a resident of the Virgin Islands. If she is not, the only reason for filing suit in the Virgin Islands, appears to be to take advantage of our unique subject-matter jurisdiction by which the District Court of the Virgin Islands entertains lawsuits that could ordinarily only be heard in a state court in the continental United States. Thus, American alleges that Tucker engaged in forum shopping to file suit in a federal district court. Why such great efforts should be made to obtain the attention of a federal court, we can't understand, but we need not decide the allegations regarding Tucker's residency status or forum shopping. The "center of gravity",[4] of the plaintiff's claim and the equities clearly lie with having a Texas state court determine the merits, rather than a court as far removed from all parties, except Tucker, and all the evidence, as is the District Court of the Virgin Islands.

The premises considered, now therefore it is

ORDERED:

THAT the defendant's motion for dismissal is GRANTED and the plaintiff's complaint shall be DISMISSED WITHOUT PREJUDICE.

[3] *Gilbert*, 330 U.S. at 508.

[4] *Firmani v. Clarke*, 325 F. Supp. 689, 692 (D. Del. 1971).

DATED this 9th day of September, 1988.

ENTER:

/s/ David V. O'Brien
DAVID V. O'BRIEN
Chief Judge

ATTEST:

Orinn Arnold, Clerk

by: /s/ [Illegible]
Deputy Clerk

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT,
CHANCERY DIVISION

No. 88 CH 0007554

MYRON (MIKE) WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

AMERICAN AIRLINES, INC., a foreign corporation,
Defendant.

---

consolidated with:

No. 89 CH 119

Honorable Arthur L. Dunne

P.S. TUCKER, on behalf of herself and all others similarly situated,
Plaintiffs,

v.

AMERICAN AIRLINES, INC., a foreign corporation,
Defendant.

ORDER

This cause coming to be heard on Defendant American Airlines' Motion For Certification of Question For Interlocutory Appeal, pursuant to Supreme Court Rule 308(a), the Court being fully advised in the premises;

The Court finds that the Court's Memorandum Opinion and Order dated March 20, 1989 involves questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

The Court therefore certifies the following question for interlocutory appeal: whether plaintiffs' claims are preempted by the Federal Aviation Act of 1958, as amended, 49 U.S.C. §§ 1301-1557, and by the federal regulations promulgated thereunder, and precluded under the Commerce Clause of the United States Constitution.

Dated: 3-25-89 Entered: /s/ [Illegible]
Judge

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 89-0918

MYRON (MIKE) WOLENS, *et al.*,
Plaintiffs-Appellees,
v.

AMERICAN AIRLINES, INC., a foreign corporation,
Defendant-Appellant.

P.S. TUCKER, *et al.*,
Plaintiff-Appellee.
v.

AMERICAN AIRLINES, INC., a foreign corporation,
Defendant-Appellant.

ORDER

This cause coming on to be heard on the application of defendant-appellant AMERICAN AIRLINES, INC., for leave to appeal pursuant to Supreme Court Rule 308 from the order of the Circuit Court of Cook County denying American Airlines' motions to dismiss the complaints in the above-named consolidated actions and the answer in opposition to said application.

IT IS ORDERED that the application be and is hereby granted;

IT IS FURTHER ORDERED that the briefing schedule be as set forth in Supreme Court Rule 343.

[June 7, 1989]

/s/ Charles G. Freeman
Justice

/s/ [Illegible]
Justice

/s/ William S. White
Justice

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 13th day of September, 1989

Docket 46188, 46192

Complaints of

AMERICAN ASSOCIATION OF DISCOUNT TRAVEL BROKERS
to American Airlines Passenger Tariffs,
CAB Nos. 465 and 409

ORDER

By a complaint filed March 17, 1989, in Docket 46188, the American Association of Discount Brokers ("complainants") request denial of the Special Tariff Permission ("STP") application filed by American Airlines on March 13, 1989, and rejection, or suspension and investigation, of the proposed tariff revisions.[1] By a similar complaint filed March 21, 1989, in Docket 46192, the complainants request rejection, or suspension and investigation, of American's proposed revisions to passenger tariff CAB No. 409, filed March 14, 1989, on statutory notice. American filed a consolidated answer to the complaints on March 27, 1989.

[1] The STP application, for permission to file revisions to American's passenger tariff CAB No. 465 for effectiveness on one day's notice, was approved on March 17, 1989. By a letter to the Director, Office of International Aviation, dated March 20, 1989, the complainants request rescission of that action. A copy of the letter, which American has addressed on its merits, has been placed in Docket 46188 and will be treated as an amendment to the complaint, requseting supplemental relief.

The complaints challenge the proposed revisions to American's frequent flyer bonus award structure and description of its "AAdvantage" program's principal features. Tariff CAB No. 409 covers transportation between points in the U.S.A. and Canada, while tariff CAB No. 465 covers transportation between points in the U.S.A./Canada and points in other countries.

According to the complainants, both the STP application and the underlying tariffs violate statutory filing requirements and DOT procedures, primarily because the tariffs allude to AAdvantage program rules that are not set forth in the tariff. Complainants challenge the tariffs for providing also that American may change the program rules "at any time." The complainants argue that this "incorporation by reference" is inconsistent with the filing and notice requirements of section 403 of the Act, with the exclusive and binding nature of filed tariffs under established judicial doctrine, and with the statutory scheme that charges DOT with the duty of approving tariff changes.[2]

In response, American asserts that the complaints misconstrue the tariffs. Rather than "incorporating" the AAdvantage rules by reference, American argues, the tariffs expressly provide that the program's terms are a matter of private contract established outside the tariff by direct notice and assent. It contends that the program

[2] The complaints also allege the following: that incorporation by reference violates the requirements of tariff completeness and specificity in § 221.38 of the Department's regulations; that tariff CAB No. 465 contains domestic tariff information in violation of the statutory "sunset" provision, section 1601(a)(2)(A), and § 399.40 of the Department's regulations; and that American has not met the criteria in § 221.190 for grant of an STP application.

In a subsequent complaint filed in Docket 46280, the complainants challenge frequent flyer program rules filed in tariffs by Continental Airlines. The complaint raises additional issues of State laws and Federal preemption. The issues raised in that docket will be dealt with by separate order.

rules themselves, as distinguished from the schedule of bonus award levels, are not required to be filed but may be provided in the tariff for clarification purposes. American denies that the revisions violate any procedural requirements or tariff policies.

American's interpretation of the tariffs is correct. The revisions to the award schedule were properly granted STP approval, and the description of the AAdvantage program rules filed with them does not violate the statute or any applicable regulatory procedures or policies.

The complainants focus on paragraphs (12) and (13) of the "general terms and conditions for all awards" contained in section 3 of the tariff.[3] By its own terms, paragraph (12) acknowledges that the tariff does not contain "a complete recitation of the rules of the AAdvantage program." Rather, paragraph (12) refers to other sources for "direct notice" of program rules and restrictions in-

[3] The complete provisions read as follows:

(12) This tariff does not establish the rules, regulations, conditions and limitations of the AAdvantage program, or any right to acquire benefits under the program. Further, a complete recitation of the rules of the AAdvantage program is not contained herein. American provides direct notice to AAdvantage members of the rules, regulations, conditions and limitations of the AAdvantage program in materials sent to members, including the AAdvantage Program brochure, the AAdvantage Newsletter, the AAdvantage Claim Form and the AAdvantage Award Certificate. These rules, regulations, conditions and limitations, include, without limitation, those relating to the accumulation of AAdvantage mileage, the use and claiming of AAdvantage awards, the time and duration of blackout periods, the expiration of AAdvantage miles and the sale and transfer of AAdvantage awards or mileage. Information about the AAdvantage program, including copies of AAdvantage program materials may also be obtained by writing to the AAdvantage Department at American Airlines, Inc., P.O. Box 619616, M.D. 1396, DFW Airport, TX 75261-9616.

(13) American Airlines has reserved the right to change the AAdvantage Program rules, regulations, travel awards and special offers at any time. American Airlines has reserved the right to end the AAdvantage program with six (6) months notice.

volving the accumulation of mileage, the claiming and use of awards, and other substantive matters. The complainants characterize this statement as incorporation by reference which, they argue, violates the duty to file all relevant information in tariffs under section 403(a) of the Act and section 221.38 of the DOT regulations. They claim further that such a provision, coupled with the right reserved in paragraph (13) to change program rules, travel awards, and special offers "at any time," allows American to make substantive program changes "by newsletter," without tariff filings required by section 403(c) and without DOT review.

As American correctly observes, however, this argument is based on several invalid premises. First and foremost, the tariffs do not purport to "incorporate by reference" any present or future frequent flyer rules or award restrictions. That is, they do not attempt to give them legal effect as part of a federally approved tariff. To the contrary, paragraph (12) states unambiguously that "this tariff does not establish the rules, regulations, conditions and limitations of the AAdvantage program, or any right to acquire benefits under the program." It confirms and provides clear notice that all such matters, the principal elements of which are generically described, are not a part of the tariff, but part of a private contract between the carrier and each participant, based on direct notice to the public of all terms and conditions through promotional and program materials.[4] As paragraph 1 of section A of the tariff makes clear, the purpose and legal effect of the tariff is to set forth the awards themselves, that is, the particular discounts or upgrade rights affecting international air fare tariffs, and not conditions of

[4] Similarly, in paragraph (13), American explicitly reserves the right to change program rules or to end the program through direct notice outside the tariff. We do not read the paragraph as being inconsistent with any tariff-filing requirements: the carrier acknowledges that it will file changes in the award schedule as part of its tariffs.

eligibility for those awards or restrictions on their redemption. While it appears that at least the principal features and restrictions of the AAdvantage program are set forth in section B of the tariff, they serve only to clarify the scope and applicability of the tariff material. Contrary to the complainants' basic assumption, they do not determine or affect consumers' substantive rights in any way.

The second erroneous premise is that the AAdvantage program rules must be filed for substantive review under the Act. As American states, section 403 requires the filing of rules in tariffs only to the extent required by regulations of the Department. Since the introduction of frequent flyer bonus programs in 1981, the carriers have voluntarily filed those award bonuses affecting fares in tariffs, and both the CAB and the Department have accepted them as appropriate binding tariff material consistent with the well-established practice of filing air fare discounts. But neither the CAB nor the Department has ever determined that any of the program rules must be filed for approval as tariffs; in other words, rule summaries have never been considered binding tariff material warranting such review.

The reasons for this policy are compelling. As American observes AAdvantage and most other frequent flyer programs are broad-based marketing programs which extend far beyond air transportation. Members can earn mileage awards by renting cars or making credit card or catalogue purchases as well as by flying; the awards may be used to obtain discounts for hotels, cars, and merchandise as well as for air fares. Moreover, while frequent flyer program benefits might involve international travel, from the outset the target public for these marketing programs has been that of the domestic market. In these circumstances, to require and review tariffs governing the program rules themselves would involve the Department in economic judgments outside of its regulatory expertise and certainly

impinge upon the mandate and principles underlying the deregulation of domestic air transportation.[5]

A third erroneous premise, closely related to the second, is that the frequent flyer program rules constitute an improper "enlargement" of transportation rights defined in the tariff, in violation of the judicial doctrine that filed tariffs are "conclusive and exclusive" statements of legal rights between carriers and passengers. American correctly observes that case law on the effect of filed tariffs merely supports the proposition that the courts will presume that tariffs are complete and conclusive statements of matters required to be filed unless the tariff contemplates supplementation through express agreement between the parties, or unless there is evidence that the parties have agreed upon terms not expressly set forth in the tariff which are not inconsistent with it. *Northwest Airlines, Inc. v. United States*, 444 F.2d 1097 (Ct. Cl. 1971); *Slick Airways Inc. v. United States*, 292 F.2d 515 (Ct. Cl. 1961).[6] Moreover, there is no law or policy precluding contractual agreement on matters not required to be filed. As it is merely clarifying information, American's summary of its program rules is not inconsistent with judicial precedent.[7]

[5] The complainants argue that the award revisions in Tariff CAB No. 465 improperly purport to govern domestic air transportation by providing for free tickets to Hawaii. However, the tariff governs travel between the United States or Canada and various points. In view of the tariff's prominent disclaimer that "none of the provisions of this tariff apply to interstate, intrastate or overseas transportation of passengers and baggage, as defined in the Federal Aviation Act," we construe the cited award provision as contemplating only foreign air transportation. In filing frequent flyer award structures, carriers should be careful to comply fully with § 399.40 of our regulations as American has.

[6] It is a well established practice under § 221.38(a), for example, that carriers need not file actual "blackout" dates, during which particular discounts are not available, or specific limits on the number of seats and/or flights available at particular discounts. Rather, tariffs need only give notice that discounts may be subject to such limits. American's tariffs do so.

The foregoing conclusions also undercut the complainants' procedural challenges to the grant of the STP application based on filing, notice, and approval requirements. Such challenges were directed at the AAdvantage rules rather than the award structure itself. Their remaining argument, that the STP application did not show an "actual emergency or real merit" as required by section 221.190 of the regulations, is similarly misplaced. American's revised award structure does in fact meet the criterion of "lowered fares, rates and charges" set forth in secton 221.190(b)(6).[8] It adds two new categories of optional awards, reduces the minimum mileage for various awards, increases the number of two-ticket awards available, and reduces certain travel restrictions. These constitute, in effect, liberalized fare discounts, which the Department has consistently held to be eligible for STP approval. And, given the clear and unambiguous language of paragraph (12) of the tariff, discussed above, there were no legal uncertainties which might have militated against STP approval. The complainants have made no allegation that the award structure is unreasonable, unduly discriminatory, or predatory under the statute. It was therefore fully consistent with Department regulations and policy to grant the STP application.

[7] Indeed, the information in American's tariffs regarding the relationship between its award schedule and the contractual means by which awards may be obtained would seem to qualify under § 221.38(a)(1) of the regulations as explanatory statements designed to remove doubt as to the application of the tariff terms themselves.

[8] The language of § 221.190(a) cited by complainants reflects the statutory exemption criteria prior to the Airline Deregulation Act of 1978. See 49 U.S.C. § 1386(b)(1), as amended by 92 Stat. 1731, 1732, 94 Stat. 39. Since then, the statutory criterion has been consistency with the "public interest," which incorporates revised procompetitive policies, and the Department has interpreted the STP rules accordingly.

Finally, there are no incompatibilities between American's tariff revisions and international tariff-filing requirements or procedures. The STP application contains the required certification that the proposal has been submitted to all affected governments where required by the bilateral air agreement, and the award structure itself plainly identifies those fare discounts which are "subject to foreign government approval." If a particular foreign government may require prior approval of aspects of the frequent flyer rules that we do not, consistent with the applicable bilateral, there is nothing in American's tariff or in our regulation which would frustrate such a requirement.

ACCORDINGLY,

1. We deny the complaints filed by the American Association of Discount Travel Brokers in Dockets 46188 and 46192, together with all related relief requested;

2. We will serve this order on American Airlines, Inc., and the American Association of Discount Brokers; and

3. We will publish a summary of this order in the Federal Register.

By:

JEFFREY N. SHANE
Assistant Secretary for Policy
and International Affairs

(SEAL)

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

No. 89-918

No. 88 CH 7554

MYRON (MIKE) WOLENS, ALBERT J. GALE,
R. CRAIG ZAFIS, BRET MAXWELL and ROBERT NELSON,
individually and on behalf of others similarly situated,
Plaintiffs-Appellees,

v.

AMERICAN AIRLINES, INC.,
a foreign corporation,
Defendant-Appellant.

Consolidated with:

No. 89 CH 119

Hon Arthur L. Dunne
Presiding

P.S. TUCKER, on behalf of herself
and all others similarly situated,
Plaintiff-Appellee,

v.

AMERICAN AIRLINES, INC.,
a foreign corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Court of
Cook County, IL County Department,
Chancery Division

ORDER

THIS MATTER COMING before the Court on defendant's Petition for Certificate of Importance, and the Court being fully advised;

The court finds that pursuant to Illinois Court Rule 316 this is an appeal involving important issues that should be heard by the Illinois Supreme Court;

IT IS THEREFORE ORDERED that the Petition is granted/, and this appeal is/certified to the Illinois Supreme Court.

ENTERED:

/s/ David Cerda
Justice

/s/ William S. White
Justice

/s/ Don Rizzi
Justice

[Ordered Entered Jan. 25, 91]

No. 93-1286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the express preemption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, preempt only those state law claims that relate to "essential" airline operations?

2. Does the scope of preemption under Section 1305 depend on the form of relief requested?

RULE 29.1 STATEMENT

Petitioner is wholly owned by AMR Corp., a Delaware corporation, and owns 49% of DFW Terminal Corp., a Texas corporation, and 50% of American Holidays, Ltd., a U.K. corporation.

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IN THE

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No. 93-1286

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

OPINION BELOW

A prior opinion of the Illinois Supreme Court in this case is reported at 589 N.E.2d 533, and is reproduced in the Appendix to the Petition for Certiorari (Pet. App.) at 20a. That opinion was vacated by this Court in *American Airlines v. Wolens*, 113 S. Ct. 32 (1992), reproduced at Pet. App. 19a. The opinion and judgment of the Illinois Supreme Court on remand is reported at 626 N.E.2d 205, and is reproduced at Pet. App. 1a.

JURISDICTION

The judgment of the Illinois Supreme Court on remand was entered on December 16, 1993. The petition for certiorari was filed on February 8, 1994, and was granted on April 4, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the express preemption clause of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1305(a)(1) ("Section 1305"), which provides in relevant part as follows:

> (a) Preemption
>
> (1) Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

STATEMENT OF THE CASE

A. Introduction.

In 1978, Congress passed the Airline Deregulation Act to bring innovative free market competition to the airline industry. To advance that objective, Congress expressly preempted the enactment or enforcement of state law "relating to rates, routes, or services" offered by airlines. 49 U.S.C. App. § 1305(a)(1). In *Morales v. Trans World Airlines Inc.*, this Court gave the statute's "sweeping" language its "commonsense" meaning, and held that Section 1305 preempts all state law having a "connection with" or "reference to" airline rates, routes, or services, even if the law would not "regulate" or "prescribe" rates, routes, or services, and even if the law's effect on rates, routes, or services is "only indirect." 112 S. Ct. 2031, 2037 (1992).

This case involves the application of Section 1305 to a state law challenge involving the rates and services offered through an airline's frequent flyer program. Like all other airlines, Petitioner American Airlines has modified its frequent flyer program over the years in response to market pressures.[1] At issue here is American's May 1988 announcement of "capacity control" restrictions for frequent flyer travel. Respondents, purporting to represent a nationwide class, have alleged that these capacity controls violated the Illinois Consumer Fraud Act and breached an implied contract.

On remand for reconsideration in light of *Morales*, the Illinois Supreme Court held that Section 1305 preempted respondents' statutory and common law claims insofar as they sought injunctive relief. That ruling was plainly correct, and respondents do not challenge it. However, the state court refused to preempt respondents' claims for compensatory and punitive damages *based on the identical allegations*. That ruling ignored the test for preemption established in *Morales*, and ignored the direct effect respondents' claims would have on American's rates and services. It must be reversed.

B. Background.

In 1978, Congress passed the ADA to "entirely overhaul the aviation regulatory system." H.R. Conf. Rep. No. 1779, 95 Cong., 2d Sess. 56 (1978).[2] The ADA

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[1] American is an interstate and international air carrier incorporated in Delaware with its principal place of business in Fort Worth, Texas. All parties to the proceedings below are listed in the caption to the petition for certiorari.

[2] *See also* H.R. Rep. No. 1211, 95th Cong., 2d Sess. 1-3 (1978). During much of this century the federal government comprehensively regulated the air travel industry, including airline rates, routes, and services. In 1938 Congress established the Civil Aeronautics Board, and gave it comprehensive authority to determine all aspects of airline competition. *See* Civil Aeronautics Act of 1938, 52 Stat. 980. In 1958 Congress passed the Federal Aviation Act, and gave the Federal Aviation Administration responsibility for regulating all aspects of airline safety. *See* Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731. *See generally* Congressional Budget Office, Policies for the Deregulated Airline In-

abolished rate regulation, lowered official barriers to entry, and removed other restrictions on competition between carriers. In general, Congress sought to place "maximum reliance on competitive market forces" to further "efficiency, *innovation* and low prices" as well as the "variety [and] quality . . . of air transportation services." *Morales*, 112 S. Ct. at 2034 (emphasis added). Congress expressly instructed the CAB (now the Department of Transportation) to exercise its remaining regulatory authority to "encourage" competition.[3] As an integral part of this procompetitive plan, Congress determined that the diverse requirements of state law should not interfere with the principal ways airlines compete for passengers, and expressly preempted all state law "relating to [the] rates, routes, or services of any air carrier." 49 U.S.C. App. § 1305.

The ADA unleashed fierce competition and brought substantial benefits to consumers. Airlines have reduced fares, expanded route networks, and introduced innovative services designed to attract passengers.[4] Frequent flyer programs are one of the most significant competitive innovations resulting from deregulation. In 1981 American introduced the first such program, the "AAdvantage"

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dustry, 1 (July 1988). The ADA deregulated the CAB's authority to regulate rates, routes, and services, but not the FAA's authority to regulate safety. *Id.*

[3] *See* 49 U.S.C. App. § 1302(a)(4) ("maximum reliance on competitive market forces and on actual and potential competition"); § 1302(a)(9) ("encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices and to determine the variety, quality, and price of air transportation services").

[4] According to the National Commission to Ensure a Strong Competitive Airline Industry, the airline industry now "[c]harges travelers and shippers less in real terms than it did in 1978." *Change, Challenges and Competition: A Report to the President and Congress* (1993) at 1. The Commission was established by Section 204 of the Airport Safety, Capacity, Noise Improvement and Intermodal Transportation Act of 1992, 49 U.S.C. App. § 1371 note ("1992 Airport Act").

program. American's competitors quickly followed suit, and today every major airline has its own program. Overall, airline frequent flyer programs have more than 30 million members.[5]

AAdvantage members accrue mileage credits when they fly on American. They can then use those credits, subject to the terms and conditions of the program, to buy tickets to fly on domestic or international routes, or to pay for upgrades to a higher level of service. AAdvantage members thus purchase airline services by redeeming accrued mileage at rates set by American. Whether tickets are purchased with cash or with AAdvantage credits, or with a combination of the two, the essence of the transaction is that American is charging specified rates for the primary service it offers—air travel.[6]

As DOT found in a comprehensive 1990 study of the airline industry, frequent flyer programs "have proven to be an extremely effective marketing practice for differentiating airline services." 1990 DOT Report, at 3. *See also id.* at 28-29, 38; DOT Order 92-5-60 (May 29, 1992), Pet. App. 99a ("carriers use their [frequent flyer] programs as a means of competing for passengers"). As DOT noted, "[m]any travellers have a preference for one carrier, often because of frequent flyer program member-

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[5] U.S. Department of Transportation, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices*, at 40 (Feb. 1990) ("1990 DOT Report").

[6] Mileage credits can be earned in a variety of other ways and can also be exchanged for services that do not involve air travel. Those non-flight services were not challenged in this litigation, in which respondents' only claim is that they have unlawfully been denied the right to use their frequent flyer mileage credits to purchase airline tickets on particular days at particular rates. In any event, airline travel awards for free or upgraded service are the primary benefit provided by frequent flyer programs. *See* 1990 DOT Report, at 34 ("Frequent flyer mileage-level awards are principally airline travel awards for free or upgraded service on the plans' participating airlines").

ships." 1990 DOT Report at 28. Frequent flyer programs are particularly important in attracting the "most lucrative segment of airline traffic—the full fare business travellers." *Id.* at 3.

Competition has spurred airlines to "greatly expand[] the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make [frequent flyer] program[s] more attractive" to consumers. 1992 DOT Order; Pet. App. 99a. For example, the AAdvantage program was initially a *temporary* promotion offering air travel to a limited number of destinations for a one year period. Responding to competition, American extended the AAdvantage program, which is now in its fourteenth year. During that time, to compete more effectively, American has expanded its route system to serve popular but previously unavailable destinations such as the Caribbean, Europe and the Far East, and has made all of that expanded route system available for purchase with AAdvantage mileage credits. American has also entered into partnerships with other domestic and foreign airlines to allow AAdvantage members to purchase tickets to an even broader array of destinations. Mileage credits accumulated before these increased benefits were made available can be used to obtain the new benefits.

Over time, however, competitive pressures have required airlines to adjust the allocation of seats among full fare passengers, discount fare passengers, and passengers paying for tickets with frequent flyer mileage credits. As program benefits expanded year after year, and passengers continued to accumulate mileage credits, airlines have found it necessary to control the number of seats available for purchase with frequent flyer credits. Without such "capacity control" restrictions, frequent flyer programs would simply become too expensive, because frequent flyers would displace too many revenue-generating passengers. Thus, as DOT has recognized, unless airlines can use "capacity controls" to sustain an

appropriate mix of passengers, frequent flyer programs would have to be terminated or severely curtailed. *See* 1990 DOT Report, at 3 (frequent flyer programs are economically feasible only if there is "minimal substitution between frequent flyer awards and airline services that would have been purchased in any case"). For this reason, DOT has concluded that capacity controls are "legitimate methods for controlling the cost of frequent flyer plans." 1992 DOT Order 92-5-60, Pet. App. 100a.

C. Respondents' Challenge.

Respondents are residents of Illinois, California and Connecticut, and purport to represent a nationwide class "consisting of approximately four million" AAdvantage members "wishing to pay for flights with free travel awards."[7] They sued American in Illinois state court, challenging American's May 1988 announcement of capacity control restrictions on the number of seats available to passengers purchasing tickets with AAdvantage credits. The restrictions applied to mileage credits accumulated either before or after the May 1988 announcement.[8]

Respondents alleged that the capacity controls announced in May 1988 violated their state statutory and common law rights to "redeem their American AAdvantage award certificates for *free air travel on any available date . . . for any available seat in the class of service provided.*"[9] According to respondents, the capacity con-

[7] Tucker Complaint, Count I, ¶ 7; Pet. App. 63a.

[8] Tucker Complaint, Count I, ¶ 8; Pet. App. 63a.

[9] Wolens Complaint, Count I, ¶ 13; Pet. App. 52a (emphasis added). Respondents also alleged that American imposed "blackout dates" on which no seats would be available for purchase with frequent flyer credits. Their claims focus, however, on the imposition of capacity controls, presumably because the blackout dates apply only to tickets purchased with mileage credits accumulated after May 1988.

trols at issue "reduced the benefits theretofore available" to them by "significantly limit[ing] the number of seats available for passengers that wish to pay for travel with Program travel awards." [10] Respondents also alleged that these capacity controls raised the rate for tickets purchased with AAdvantage miles, because the capacity controls could be avoided only by redeeming a higher number of mileage credits.[11]

Respondents alleged that American's conduct violated the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121½, sec. 261 *et seq.*, which requires that "all material terms and conditions relating to" a promotional offer be "clearly and conspicuously disclosed" at the "outset" of the offer so as to leave "no reasonable probability" that the offering "might" be misunderstood. *Id.* Respondents admitted that prior to May 1988 American had "reserved the right to restrict, suspend, or otherwise alter aspects of the Program" in its communications with AAdvantage members.[12] For example, American's April 1987 AAdvantage rules brochure expressly provided that "AAdvantage program rules, regulations, travel awards and special offers are subject to change without notice," and provided that American "reserves the right to terminate the AAdvantage program at any time." [13] Respondents nevertheless

[10] Wolens Complaint, Count I, ¶ 4; Pet. App. 50a. Respondents noted that *other* changes announced in the May 1988 announcement applied "to mileage credits earned and accrued thereafter," Tucker Complaint, Count I, ¶ 14; Pet. App. 65a, but their claims challenge only changes that applied to "mileage credits which plaintiff and other members of the Class had earned and accumulated prior" to that announcement. *Id.* at ¶ 14; Pet. App. 65a; Wolens Complaint, Count I, ¶ 15; Pet. App. 52a-53a. *See* Brief in Opposition (No. 93-1286), at 3-4.

[11] Tucker Complaint, Count I, ¶¶ 14-18; Pet. App. 65a-66a.

[12] Tucker Complaint, Count I, ¶ 12; Pet. App. 64a. *See* Brief in Opposition (No. 93-1286), at 4.

[13] The brochure is part of the record below, and has been lodged with the Clerk of the Court.

contended that American's express reservation did not satisfy the disclosure requirements of the Illinois Consumer Fraud Act.

Respondents also alleged that the *same conduct* breached common law contractual obligations. According to respondents, American's advertisements and communications "in diverse national media and by general mailings and distribution of promotional materials" induced respondents to choose American over competing airlines.[14] Respondents contend that American's statements, in the aggregate, amounted to an implied promise that accumulated miles could be redeemed at any time in the future at the benefit levels in effect at whatever time the miles were accumulated.[15] As a matter of state law, respondents contend, American's express reservation of the right to restrict AAdvantage benefits could not limit or condition this alleged implied promise. Thus, respondents claim, American's May 1988 capacity control announcement constituted a breach of contract.[16]

Respondents sought two forms of relief for each alleged state law violation: (i) an injunction to force American to redeem mileage credits accumulated before May 1988 for the same AAdvantage fares and unrestricted seating respondents allegedly could have obtained before that date, and preventing "retroactive application" of any future changes in the program; [17] and (ii) compensatory and punitive damages. To obtain a judgment ordering either form of relief, respondents would have had to ob-

[14] Wolens Complaint, Count I, ¶¶ 2, 10; Pet. App. 49a, 51a.

[15] Wolens Complaint, Count I, ¶ 11, Pet. App. 51a-52a (respondents "accrued a contractual right to receive . . . the benefits to which said mileage credits were entitled under the Program in effect when the mileage credits were earned").

[16] Wolens Complaint, Count I, ¶ 15; Pet. App. 52a-53a.

[17] Tucker Complaint, Count I, Prayer C; Pet. App. 67a.

tain an identical declaration of their rights under Illinois law.

D. Judicial Proceedings.

1. *The Trial Court's Decision.*

American moved to dismiss on the ground that respondents' claims related to American's "rates, routes, or services," and were therefore preempted by Section 1305. The trial court denied American's motion but certified an interlocutory appeal. Pet. App. 41a.

2. *The Illinois Supreme Court's Initial Decision.*

After an intervening appellate court decision (Pet. App. 31a), the Illinois Supreme Court held that Section 1305 preempted respondents' statutory and common law claims for injunctive relief because such "relief would involve the regulation of defendant's services." Pet. App. 23a. The court then ruled, however, that Section 1305 did not preempt respondents' identical "claims for *damages* for breach of contract and violation of the Consumer Fraud Act." Pet. App. 23a (emphasis added). The court held that "section 1305(a)(1) pre-empts claims *only when* the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services." Pet. App. 23a (emphasis added; quotation omitted). The court frankly stated it had "narrowly construed" Section 1305. Pet. App. 24a.

Chief Justice Miller disagreed with the majority's view that preemption depends on "whether the State law at issue is general or specific." Pet. App. 25a. He nonetheless concurred in the judgment. In his view, Section 1305 did not preempt respondents' damage claims because those claims were "not regulatory in force or effect" and "do not establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." Pet. App. 28a.

3. *This Court's Prior Decision.*

After the Illinois Supreme Court's initial decision, this Court rendered its first definitive construction of Section 1305 in *Morales v. Trans World Airlines, Inc.* Unlike the Illinois Supreme Court, this Court gave Section 1305 a "broad" and "expansive" interpretation. 112 S. Ct. at 2037. *Morales* held that state law "relates to" airline "rates, routes or services," and is therefore preempted by Section 1305, if it has a "connection with or reference to" rates, routes, or services—"even if the law is not specifically designed" to regulate airlines and even if its effect is "only indirect." *Id.* at 2033, 2038. *Morales* found it "utterly irrational" that "state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general" law. *Id.* at 2038. Applying this test, the Court held that Section 1305 preempted enforcement of the Texas consumer protection statute against airline fare advertisements.

After *Morales* was decided, American petitioned for certiorari in this case, arguing that the Illinois Supreme Court's decision relied on precisely the distinction *Morales* rejected—between general laws and laws that "specifically" relate to airline rates, routes, or services. Respondents did not cross-petition. They conceded that the state court's decision to preempt their statutory and common law injunctive claims was "carefully reasoned" and "fully consistent" with *Morales* because injunctive relief "would require the court to regulate the manner in which American provided its passengers transportation services."[18] Seeking to distinguish their damage claims, respondents argued that damages, unlike an injunction, would not directly regulate American's conduct.[19]

This Court granted American's petition for certiorari, vacated the Illinois Supreme Court's judgment, and re-

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[18] Brief in Opposition (No. 92-249), at 9.

[19] *Id.* at 9-11.

manded for reconsideration in light of *Morales*. *American Airlines, Inc. v. Wolens*, 113 S. Ct. 32 (1992); Pet. App. 19a.

4. The Illinois Supreme Court's Decision on Remand.

On remand, after reaffirming preemption of respondents' injunctive claims, the Illinois Supreme Court concluded that its "previous holding that plaintiffs' claim for money damages was not preempted . . . comports with the *Morales* decision." Pet. App. 2a, 6a. The court gave two new reasons for this ruling. *First*, the court concluded that "[a] frequent flyer program is not an essential element to the operation of an airline" because "the airline industry functioned successfully for decades" without frequent flyer programs. Pet. App. 6a. Therefore, in the court's view, respondents' damage claims would have only a "peripheral" or "tangential" effect on essential airline operations. Pet. App. 6a. *Second*, expressly adopting the test for preemption urged in Chief Justice Miller's prior concurrence, the court concluded that because respondents were seeking "*only* money damages," Pet. App. 6a (emphasis added), their claims did not "seek to 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.'" *Id.* (quoting prior concurring opinion of Chief Justice Miller).

Justice McMorrow dissented. She noted that "reduced to their simplest terms, plaintiffs' claims . . . are based upon allegations of American's deceptive advertising, promotions, and inducements relating to airline fares (i.e., payment of travel fares with mileage credits and upgrades in seating class[es]) and services (i.e., the quantity of seats and flights and the dates of travel to various destinations)." Pet. App. 12a. Recognizing that *Morales* gave an "expansive and sweeping interpretation of the phrase 'relating to'," Justice McMorrow concluded that "plaintiffs' [compensatory and punitive damages] claims have a connection with and relation to American's rates and

services, and are preempted by section 1305(a)(1) of the Deregulation Act." Pet. App. 13a, 14a, 16a.

Justice McMorrow stressed that *Morales* "rejected a contention essentially the same as that made by Justice Miller in his special concurrence to [the state] court's previous opinion *and now adopted by the majority*, that plaintiffs' claims are not preempted because they do not seek to 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.'" Pet. App. 9a (quoting majority opinion; emphasis added). In Justice McMorrow's view, Section 1305 applied equally "whether plaintiffs seek [an injunction] to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations." Pet. App. 13a. As she explained, a finding that American violated state law was equally "necessary whether plaintiffs seek to enforce the terms and conditions of the program or an award of money damages for American's alleged breach of those contractual obligations." Pet. App. 13a. In particular, she noted that respondents sought a state law declaration requiring American to "continue to redeem mileage credits earned prior to May 1988 for the same free fares and unrestricted seating and flight services which the AAdvantage program [allegedly] provided up until that time." *Id.*

SUMMARY OF ARGUMENT

Section 1305 expressly preempts the claims pursued here by respondents. The statutory language, on its face, bars States from entertaining *any* causes of action that relate to "rates, routes, or services." Moreover, the application of that statutory language to bar the claims in this case is mandated by *Morales*, a case that is indistinguishable from this one. Both cases involve claims under state consumer fraud acts challenging the way airline services were offered to the public. *Morales* made clear that such laws fall within Section 1305 because they have a "connection with or reference to" airline rates, routes, or services. *Morales* also made clear that claims for damages for breach of contract under state common law would be equally preempted. In fact, *Morales* expressly relied on cases preempting contract claims under the similarly worded ERISA preemption provision.

At the most basic level, respondents have invoked state law to challenge American's decisions about how to allocate seats between revenue-generating passengers and frequent flyer passengers, and American's decisions about what rates to charge AAdvantage members for air transportation. The Illinois Supreme Court recognized as much when it correctly held that respondents could not pursue injunctive relief to bar implementation of those decisions. Respondents' damage claims are no different in nature or effect. The damage claims arise out of the same nucleus of operative fact and require the same declaration of state law rights. To have avoided the damages respondents seek, American would have had to allocate tens of thousands of additional seats to AAdvantage passengers using pre-1988 mileage credits, and correspondingly fewer to revenue-generating passengers. There is thus no justification for the state court's refusal to preempt all of respondents' claims.

Preemption would directly further the core objectives of the ADA. If basic airline decisions about how to compete were subject to the conflicting statutory and common law of fifty States, airlines would be forced to conform their decisions to the standards of the most restrictive state. The ADA was enacted to encourage innovative forms of competition. Subjecting competitive decisions to state law would discourage the very innovation the ADA was intended to promote.

Preemption will not leave passengers without meaningful remedies. As *Morales* noted, DOT has ample authority under Section 411 of the Federal Aviation Act to deal with unfair airline practices. DOT also has explicit statutory authority under 49 U.S.C. § 1371(q)(2) to require air carriers to provide "appropriate compensation" to "travelers" for "failure on the part of such carrier to perform air transportation services in accordance with agreements therefor." Unlike state law remedies, federal remedies will be uniform, and will be devised by an agency that is in a position (as state courts are not) to consider nationwide needs and circumstances. Moreover, the ADA expressly commands DOT to act consistently with the core statutory policy of placing maximum reliance on marketplace competition to "provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of air transportation services." 49 U.S.C. App. § 1302(a)(9). State remedies are preempted for the very good reason that state courts need not consider, as DOT must, whether the requested remedies would discourage innovative forms of airline competition.

ARGUMENT

I. THE AIRLINE DEREGULATION ACT EXPRESSLY PREEMPTS RESPONDENTS' STATE STATUTORY AND COMMON LAW CLAIMS BECAUSE THOSE CLAIMS PLAINLY RELATE TO AMERICAN'S "RATES" AND "SERVICES".

A. Section 1305 Preempts Respondents' State Law Challenges To The Rates And Services American Decides To Offer Through Its Frequent Flyer Program.

Section 1305 is a clear textual mandate preempting the enactment or enforcement of any state "law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." As this Court recently held in *Morales*, the "relating to" language of Section 1305, like its ERISA counterpart, requires preemption of all state laws "having a *connection with* or *reference to*" airline rates, routes, or services. 112 S. Ct. at 2037 (emphasis added). The "connection with or reference to" standard "is true to the ordinary meaning of 'relate to' . . . and thus gives effect to the deliberately expansive language chosen by Congress." *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 583 (1992) (citing *Morales*).[20]

[20] Express preemption provisions, like all other statutory provisions, should be construed in accordance with their ordinary meaning, unless there are compelling indications that Congress intended a more restrictive meaning. *CSX Transp., Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("express pre-emption clause . . . necessarily contains the best evidence of Congress' pre-emptive intent"); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) ("Where, as here, Congress has expressly included a broadly worded preemption provision . . . [the] task of discerning congressional intent is considerably simplified"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983) ("plain language [controls] unless there is good reason to believe Congress intended the language to have some more restrictive meaning"). *Cf. Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990).

Legislative history confirms this broad meaning. In conference, Congress rejected narrower language enacted by the Senate, which would have preempted only laws "determining" rates, routes, or services, and instead adopted the broader "relating to" standard. *See Morales*, 112 S. Ct. at 2038 n.2. Subsection (b) of Section 1305 also confirms the broad reading because it saves from preemption the exercise of state "proprietary powers and rights"—which would have been unnecessary if Congress intended Section 1305 to preempt only direct state regulation of rates, routes, or services. *Id. See also Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98.

Section 1305 forecloses respondents' challenge. Although respondents have invoked state statutory and common law of general application, *Morales* left no doubt that Section 1305 preempts state law of "general applicability" to the extent that its "particularized application" relates to airline rates and services. 112 S. Ct. at 2038. Here respondents seek to apply state law to challenge American's 1988 decisions regarding the appropriate mix of full fare passengers and AAdvantage passengers on American flights, and the rate for unrestricted AAdvantage travel. That is precisely the kind of claim the statute preempts.

Respondents' pleadings make clear that their claims are based on American's rate and service decisions. The claims are pressed on behalf of "persons wishing to *pay for flights* with free travel awards."[21] Respondents flatly assert a right "to redeem their American AAdvantage award certificates for *free air travel on any available date . . . for any available seat in the class of service provided*" at AAdvantage rates in effect before May 1988.[22] That right was violated, they contend, "by the implementation of capacity control restrictions,"[23] which limited "the maximum number of seats allocated to persons wishing

[21] Wolens Complaint, Count I, ¶ 14; Pet. App. 52a (emphasis added).

[22] Wolens Complaint, Count I, ¶ 13; Pet. App. 52a (emphasis added); *see also* Wolens Complaint, Count III, ¶ 10; Pet. App. 55a-56a.

[23] Wolens Complaint, Count III, ¶ 15; Pet. App. 56a-57a.

to pay for flights with free travel awards," and by the increase in AAdvantage rates for travel without capacity control restrictions.[24] And they seek damages measured by the difference between the rates for unrestricted AAdvantage travel at pre-1988 levels and the rates for such travel after 1988.[25] *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48 (1990) ("common law cause of action . . . based on" conduct involving benefit plan "relates to" that plan under ERISA preemption provision); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) (common law cause of action "premised on" existence of benefit plan "relates to" that plan under ERISA preemption provision).

As their pleadings demonstrate, respondents seek to impose particular state law requirements on the airlines' competitive efforts to attract passengers through their frequent flyer programs. If not preempted, those requirements would cut to the heart of airline operations. That much is clear from what American would have had to do to minimize damages liability on respondents' claims: rescind its May 1988 capacity control decision and make an unlimited number of unrestricted seats available to passengers seeking to redeem AAdvantage credits accumulated before May 1988.

Such a forced change would be highly disruptive. Each seat provided to an AAdvantage member is a seat that cannot be sold to a full fare or discount fare passenger. Invariably, therefore, fewer seats would be available for other passengers if the 1988 capacity control restrictions were rescinded. Some full fare business passengers, particularly on peak flights, would be displaced, resulting in lower revenues per flight. Alternatively, to protect seats for full fare passengers on those flights, American would have to further restrict the seats available for discount fare passengers and for passengers seeking to redeem post-1988 AAdvantage credits. If allowed to proceed, therefore, respondents' claims would affect American's revenues, seat allocations and pricing decisions in a direct and fundamental way. And the risk of such damage awards would certainly inhibit future competitive innovations.

[24] Wolens Complaint, Count I, ¶ 14; Pet. App. 52a; *see also* Wolens Complaint, Count I, ¶ 4; Pet. App. 50a; Tucker Complaint, Count I, ¶ 14; Pet. App. 65a.

[25] Wolens Complaint, Count I, Prayer B; Pet. App. 53a (damages sought in "the amount that the value of the mileage credits earned . . . prior to May 18, 1988 . . . was reduced" by capacity controls).

In this respect, the "connection with" airline rates and services is even stronger here than it was in *Morales*. In *Morales*, this Court found a sufficient "connection" between the Texas law at issue and airline rates because violation of that state law could hypothetically give "consumers a cause of action for at least actual damages," since they would have "an enforceable right to [a discount] fare when the advertisement [for that fare] fails to include the mandated explanations and disclaimers." 112 S. Ct. at 2039. Because the consumer claim was hypothetical in *Morales*, the airlines could avoid liability simply by changing their future advertisements to include the information state law required, without changing the underlying rates they offered. In this case, respondents have actually brought precisely the kind of damage claims hypothesized in *Morales*, and have done so as a nationwide class. American could not avoid liability simply by including the "mandated explanations and disclaimers" in future communications. American would have to change the future allocation of seats among various classes of passengers, and would have to charge a different mix of rates than it would otherwise charge.

The state law respondents seek to enforce here would also impose prospective obligations that have a "connection with" American's rates and services at least as strong as the connection found in *Morales*. Just as

the Texas law at issue in *Morales* "establish[ed] binding requirements as to how tickets are to be marketed if they are to be sold at all," 112 S. Ct. at 2040, the Illinois laws at issue here would impose binding requirements as to how frequent flyer programs can be marketed. Those requirements would have the same "significant effect" as the laws at issue in *Morales*. *Id.* at 2039.[26] In *Morales*, the Court noted that burdensome disclosure requirements would severely constrain the airlines' ability to impose capacity controls on discount fares, and hence their ability to offer discount fares in the first place. *Id.* The same is true here. Frequent flyer programs may well become prohibitively expensive without capacity controls because they will simply displace too many revenue-generating passengers.[27] Burdensome advance disclosure requirements can seriously impede an airline's use of capacity controls, and hence its ability to remain competitive in the volatile air transportation marketplace. Indeed, the frequent flyer portion of the NAAG Guidelines—to which Illinois is a signatory—imposes disclosure requirements much like the discount fare disclosure requirements invalidated in *Morales*. *See* 112 S. Ct. at 2041 (reprinting Guidelines).

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[26] In any event, preemption under Section 1305 does not require a showing of significant effect. A state law "relates" to airline rates, routes, or services if it has a "connection with or reference to" those rates, routes, or services, and, as under ERISA, is preempted "on that basis alone." *Greater Washington Bd. of Trade*, 113 S. Ct. at 583. Because this case involves express preemption, state law is ousted whether or not it conflicts with federal objectives. *Morales*, 112 S. Ct. at 2038.

[27] Airlines know, for example, that Monday morning flights between Dallas and New York are likely to attract substantial numbers of full fare business travellers. Conversely, there will be relatively few full fare business travellers on flights between Los Angeles and Hawaii. Since most of the seats on the Hawaiian flights will be occupied by persons using frequent flyer awards or discount fares, it is important that a sufficient number of seats on the Monday morning Dallas/New York flights are available for purchase by full fare passengers.

This case cannot be distinguished from *Morales* on the ground that respondents have alleged common law claims as well as statutory claims.[28] Surely, the result in *Morales* would not have been different if state common law contract claims based on discount fare advertisements were also at issue. Common law is plainly "law" within the meaning of Section 1305.[29] Respondents' common law claims have precisely the same "connection with or reference to" American's rates and services as do their statutory claims. As this Court's ERISA precedents make clear, the "relating to" language of Section 1305 encompasses common law contract claims as well as statutory claims. *See Pilot Life*, 481 U.S. at 43-44. Indeed, *Morales* specifically held that the statutory claims at issue there were "much like" the "common law . . . contract" claims at issue in *Pilot Life*, and should be found to "relate to" airline rates, routes, and services for the same reason the common law claims at issue in *Pilot Life* were found to "relate to" employee benefit plans under ERISA. *Morales*, 112 S. Ct. at 2039.[30]

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[28] The Illinois Supreme Court ruled that respondents' contract claims *do* "relate to" American's rates, routes, or services, insofar as those claims sought injunctive relief (Pet. App. 2a, 23a), and respondents do not challenge that ruling. Brief in Opposition (No. 93-1286) at 14a. Thus, the only dispute is whether the contract claims relate to rates, routes, or services insofar as they seek damages. That issue is addressed *infra*, Point I.B.

[29] *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) ("[a]t least since *Erie R. v. Tompkins* . . . we have recognized the phrase 'state law' to include common law as well as statutes and regulations"); *Norfolk & W. R. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) (phrase "all other law" does not "admit[] of a distinction between positive enactments and common-law liability rules"); *Easterwood*, 113 S. Ct. at 1737 (statute premepting any state "law, rule, regulation, order or standard" encompasses "legal duties imposed . . . by common law").

[30] In order to prevail on the *merits* of their contract claim, respondents will have to use *state* law to determine which of the many advertisements, newsletters, and other communications be-

Furthermore, it would elevate form over substance to preempt statutory but not common law claims. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). In *Kalo Brick*, after finding a state statutory claim preempted by the Interstate Commerce Act, the Court observed that "[t]he same reasoning applie[d]" to the common law claims at issue "because they, too, are essentially attempts to litigate the [same] issues." 450 U.S. at 326. As the Court made clear, "compliance with the intent of Congress cannot be avoided by mere artful pleading." 450 U.S. at 324. The same must be true here.[31]

B. The Illinois Supreme Court's Decision Cannot Be Squared With Morales.

The Illinois Supreme Court's refusal to preempt respondents' damage claims flies in the face of *Morales*. Indeed, the state court's decision is inexplicable given its prior, unchallenged holding that Section 1305 preempts

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tween American and the public embody the terms of the "contract" at issue, to determine precisely what those terms are, and then to determine whether American's express reservation of the right to restrict or terminate the AAdvantage program is for some reason unenforceable. *See generally Norfolk & W. R. Co.*, 499 U.S. at 129 (statutory phrase "laws" includes "obligations imposed by contract" because "the obligation of a contract is the law which binds the parties to perform their agreement," the "contract depends on a regime of common and statutory law for its effectiveness and enforcement," and "a contract has no legal force apart from the law that acknowledges its binding character") (internal quotations omitted).

[31] Section 1506, the so-called saving clause, does not help respondents. 49 U.S.C. App. § 1506. As *Morales* held, Section 1506 "cannot be allowed to supersede the specific substantive pre-emption provision" contained in Section 1305. 112 S. Ct. at 2037. Here, as under ERISA, savings or exemption clauses "do not limit the pre-emptive sweep . . . once it is determined that the law in question relates to" airline rates, routes or services. *Greater Washington Bd. of Trade*, 113 S. Ct. at 584. *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

respondents' injunctive claims. Pet. App. 2a; Pet. App. 23a.

Seizing on dicta in *Morales*, the state court reasoned that respondents' damage claims were "too tenuous, remote or peripheral" to warrant Section 1305 preemption because frequent flyer programs are not "essential" to airline operations, and because "money damages" would not "establish" the rates, "determine" the routes, or "dictate" the services airlines offer. Even if the *Morales* dicta supported the decision below, and it does not, "[i]t is to the holdings of [this Court's] cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co.*, No. 93-263, 1994 WL 183616, at *3 (May 16, 1994). Far from supporting the decision below, the holding in *Morales* directly refutes the state court's reasoning.

First, the state court's inquiry into whether frequent flyer programs were historically "essential" to airline operations is wholly insupportable. Nothing in the statutory text, this Court's ruling in *Morales*, or the broad legislative purposes of the ADA supports such an analysis. To the contrary, it is antithetical to the expansive "connection with or reference to" test established in *Morales*. Under the state court's "essentiality" analysis, airline practices postdating the ADA—including not only frequent flyer programs but also other competitive innovations such as American's Ultimate Supersaver deep discount fares—are not "essential" and therefore not preempted. By using a historical test to determine what airline operations are "essential," and therefore preempted, the Illinois Supreme Court would effectively permit States to regulate the very innovations Congress intended to encourage.[32] Indeed, the state court did not take its own

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[32] Furthermore, quite apart from its historical focus, the Illinois Supreme Court's "essentiality" test would require state courts to make technical, expert judgments whether the conduct at issue concerns a part of the airline's business that is "essential" to its operations.

"essentiality" test seriously: it preempted respondents' injunctive claims even though they involved the identical "nonessential" frequent flyer services.

Second, as Justice McMorrow stressed in dissent, *Morales* squarely *rejected* the contention that Section 1305 "only preempts the States from actually prescribing rates, routes, or services," and held that such an interpretation "simply reads the words, 'relating to' out of the statute. Had the statute been designed to pre-empt state law in such a limited fashion, it would have forbidden the States to '*regulate* rates, routes, and services,'" Pet. App. 16a (quoting *Morales*, 112 S. Ct. at 2037-38 (emphasis in original)). Thus, *Morales* flatly rejected the key premise of the Illinois Supreme Court's decision on remand.

Accordingly, that decision can be upheld only if damages and injunctive relief warrant different treatment for preemption purposes—a point respondents candidly admit. *See* Brief in Opposition (No. 93-1286), at 14 (*Morales* permits "distinction between damage claims and claims for injunctive relief"). But this Court has consistently refused to distinguish between damage claims and injunctive claims under the similarly worded ERISA preemption provision. *E.g., Pilot Life; Ingersoll-Rand Co.* In *Morales*, the Court made clear that those ERISA precedents are fully applicable to Section 1305. Indeed, *Morales* expressly followed *Pilot Life*, which "held that a common-law tort and contract action *seeking damages* . . . was pre-empted by ERISA." *Morales*, 112 S. Ct. at 2039 (emphasis added).

This Court's preemption jurisprudence generally abjures distinctions based on the form of relief. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959); *International Paper Co. v. Ouellette*, 479 U.S. 481, 498 n.19 (1987). In *Cipollone*, Justice Stevens' opinion (for four Justices) refused to distinguish between damages and injunctive claims, because

"'regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" 112 S. Ct. at 2620 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 247). *Accord Cipollone*, 112 S. Ct. at 2632, 2634 (Scalia and Thomas, JJ., concurring). In *Ouellette*, the Court declined "to draw a line between the types of relief sought. . . . [U]nless there is evidence that Congress meant to 'split' a particular remedy for pre-emption purposes, it is assumed that the full cause of action under state law is . . . pre-empted." 479 U.S. at 499.[aa]

Nothing in the text or legislative history of Section 1305, or the broad purposes of the ADA, even remotely suggests such an intent. To the contrary, as *Morales* makes clear, Section 1305 preempts state law having a "connection with or reference to" airline rates, routes, or services regardless of whether the preempted claim would have a regulatory effect on those rates and services. 112 S. Ct. at 2033. In any event, respondents' damage claims would be preempted even if such a showing were required. "'[T]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 247). *Accord Cipollone*, 112 S. Ct. at 2634 (Scalia and Thomas, JJ., concurring). Indeed, *punitive* damages are *intended* to be regulatory. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044 (1991); *Smith v. Wade*, 461 U.S. 30, 49 (1983).

Thus, for all these reasons, there can be no serious question that respondents' claims relate to American's rates

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[aa] Thus, where the Court has found that damages relief was not preempted, the text or legislative history of the provision at issue made clear that Congress intended a distinction between injunctive relief and damages. *See, e.g., Cipolione*, 112 S. Ct. at 2619; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-256 (1984); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.1 (1988).

and services under the interpretation of Section 1305 adopted in *Morales*. Respondents do not dispute that *Morales* interpreted Section 1305 correctly. *See* Brief in Opposition (No. 93-1286), at 6 (no need to re-examine "the carefully considered—and recent—ruling in *Morales*"). That concession defeats their case because, as demonstrated, there is simply no principled basis on which this case may be distinguished from *Morales*, and no principled reason for departing from *Morales*. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 & n.34 (1986); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

II. PREEMPTION OF RESPONDENTS' CLAIMS DIRECTLY ADVANCES THE GOALS OF THE AIRLINE DEREGULATION ACT.

In any preemption case, "[t]he purpose of Congress is the ultimate touchstone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). As this Court recognized in *Morales*, in the ADA Congress determined that " 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices,' as well as variety [and] quality . . . of air transportation services." 112 S. Ct. at 2034 (quoting 49 U.S.C. App. § 1302). Giving full effect to Section 1305's expansive *language* directly advances the ADA's core *purposes*.

Congress plainly expected airline competition to focus on the rates, routes, and services offered prospective passengers because these are the principal ways airlines can differentiate themselves in the marketplace. To ensure that competition would be vigorous, Congress barred the States from interfering with the choices airlines make regarding the rates and services offered to the public. As the CAB, which played an important role in the drafting and passage of the ADA, noted in 1979, Section 1305 was intended to preempt state interference with "the economic factors that go into the provision of the quid pro quo for a passenger's fare." 44 Fed. Reg. 9948, 9949. As the

CAB explained, "states may not interfere with a federal carrier's decision on how much to charge" and "may not interfere with the services that carriers offer in exchange for their rates." *Id.* Congress knew that preemption would deprive consumers of remedies they would otherwise have under state law. That is what preemption does. But Congress determined that consumers would be better off by making the market for air travel truly competitive.

Having decided that federal law should not hamper free competition for airline passengers, Congress could hardly have intended to allow the States to hobble that competition through the application of restrictive state laws. *See Morales*, 112 S. Ct. at 2034. That is plainly so with respect to statutes such as the Illinois Consumer Fraud Act, as *Morales* held. Innovation would surely be stifled if individual States could impose their own notions of fair dealing, and could impose substantive duties regarding airline rates and services as a sanction for failing to conform to those requirements.

That is no less true with respect to state common law, as the present case amply illustrates. Here, respondents seek to have Illinois courts fix the terms of a contractual relationship on the basis of American's many advertisements and public communications, to decide what duties can be implied from that relationship, and to determine the extent to which American's express reservation of the right to change the AAdvantage program without notice is enforceable. If States are free to impose such duties, in the guise of "interpreting" contracts, airlines will be deterred from offering competitive innovations like frequent flyer programs, particularly if, as here, state common law can give rise to potentially massive unforeseen obligations of unlimited duration.

For example, if Illinois contract law precluded enforcement of American's general reservation of rights clause, then American could never terminate particular routes, no matter how unprofitable they became, until all miles accumulated prior to explicit notice that those routes would be discontinued had been exchanged. If airlines had to anticipate and provide *specifically* for every future contingency, or be subject to suit for breach of implied contractual duties based on state notions of what is fair and reasonable; they would be reluctant to offer new services.

Preemption is also necessary to ensure uniformity, which is itself critical to achieving Congress' procompetitive objective. As this Court recognized in interpreting the cognate ERISA preemption provision, "it is foreseeable that state courts, exercising their *common law* powers, might develop different substantive standards applicable to the *same* . . . conduct, requiring the tailoring of [such] conduct to the peculiarities of each jurisdiction. Such an outcome is fundamentally at odds with the goal of *uniformity* that Congress sought to implement." *Ingersoll-Rand Co.*, 498 U.S. at 142 (emphasis added). Here, the risk that airlines would be subjected to diverse and inconsistent standards is even greater, because air transportation is inherently interstate in character. Every major airline operates in many States. As the experience in Illinois proves, liberal jurisdiction, class action, and choice-of-law rules make airlines amenable to nationwide lawsuits virtually anywhere they do business. Absent preemption, therefore, airlines would inevitably face the risk of manifold and conflicting obligations—a risk that could be minimized only by continually ascertaining and meeting the changing statutory and common law requirements of the most restrictive state. *See also Kalo Brick & Tile Co.*, 450 U.S. at 324. Even assuming airlines could do that, the result would be that instead of differentiating their operations in innovative ways, all airlines would be forced to conform their operations to the most restrictive state

standards. Airlines would be free to compete under federal law, but forced to conform under state law.

Indeed, the present case proves the wisdom of Congress' choice. Frequent flyer programs are precisely the kind of competitive innovation Congress sought to encourage. DOT has described frequent flyer programs as "an extremely effective marketing practice for differentiating airline services." 1990 DOT Report, at 3. Even respondents acknowledge that American's AAdvantage program is a "marketing tool for American to compete with other airlines for customers."[34] Airlines can, and do, make policy choices regarding the differing mix of benefits and restrictions they will offer in their frequent flyer programs. But respondents now seek to challenge some of those choices as conflicting with state policies.

Barring respondents and others from bringing such challenges will not leave consumers without effective remedies. As Congress envisioned, market forces can be expected to constrain truly unfair or deceptive practices. Airlines cannot afford to alienate consumers through unfair or deceptive practices, particularly on a widespread or systematic basis. Furthermore, as this Court recognized in *Morales*, airlines are subject to a uniform federal regulatory scheme. 112 S. Ct. at 2040. Section 411 of the FAA, 49 U.S.C. App. § 1381, prohibits airline practices that are either "unfair" or "deceptive," or that constitute "unfair methods of competition in air transportation or the sale thereof," and specifically authorizes DOT to enforce the prohibition when enforcement would further "the public interest."[35]

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[34] Brief in Opposition (No. 93-1286), at 3-4; *see* Wolens Complaint, Count I, ¶ 1; Pet. App. 48a-49a.

[35] DOT has ample authority under this provision to "perform such acts, to conduct such investigations, to issue and amend such orders . . . as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter." 49 U.S.C. App. § 1324(a). Congress has also

DOT also has ample authority to compensate consumers for injuries resulting from airline violations of Section 411. DOT can abate civil penalties upon payment of compensation to injured consumers. *E.g. In re Red Lion Inn & Casino*, DOT Order 91-7-36 (July 25, 1991); *In re Tropical Airlines, Inc.*, DOT Order 87-12-43 (Dec. 17, 1987); *Davis Agency, Inc. Enforcement Proceeding*, CAB Order 83-1-99 (Jan. 26, 1983).

Furthermore, Congress gave DOT express statutory authority to order airlines to pay "appropriate compensation . . . as prescribed by" DOT, for "failure on the part of such carrier to perform air transportation services in accordance with agreements therefor." 49 U.S.C. App. § 1371(q)(2).[36] The section authorizes the Civil Aeronautics Board (now DOT) to require any certificated air carrier "to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the

established standards and procedures for DOT enforcement actions, 49 U.S.C. App. § 1482, and specified various types of relief that can be awarded. 49 U.S.C. App. § 1471 (authorizing civil penalties up to $10,000 per violation); *id.* § 1471(a) ("each flight with respect to which such violation is committed . . . shall constitute a separate offense"); 49 U.S.C. App. § 1482(c) (authorizing cease and desist orders). Enforcement procedures and mechanisms are set forth in detailed regulations. *E.g.*, 14 C.F.R. § 302.200(b) (authorizing informal written complaints for acts or omissions "in contravention of any provision of the act or any requirement established pursuant thereto"); 14 C.F.R. § 302.201 (authorizing "any person" to make a formal complaint alleging a violation of regulations and requesting agency enforcement).

[36] Congress intended the remedy authorized by this section to expand CAB's previous authority to regulate charter carriers, and, moreover, Congress expanded CAB's remedial authority at the same time as it enacted Section 1305, the express preemption clause. The fact that Congress gave a federal agency, and only a federal agency (CAB, now DOT), express authority to determine "appropriate compensation" for breach of contracts between airlines and passengers is an additional structural confirmation that Congress intended Section 1305 to preempt *state* law remedies for breach of such contracts.

Board shall prescribe," in order to ensure that "travelers" will receive "appropriate compensation . . . as prescribed by the *Board*," for breach of contractual agreements between the traveler and the carrier. *Id.* (emphasis added).[37]

Thus, Section 411 (49 U.S.C. App. § 1381) and 49 U.S.C. App. § 1371(q)(2) provide ample authority for the DOT to protect consumers should DOT determine such protection is needed. DOT has aggressively enforced Section 411 against airlines that have, in DOT's view, provided inadequate notice of capacity controls and blackout dates on discount fares. *See In re Continental Airlines, Inc.*, DOT Order 93-10-49 (Oct. 29, 1993); *In re Icelandair*, DOT Order 93-2-25 (Feb. 9, 1993). DOT could equally enforce Section 411 against airlines that have, in DOT's view, provided inadequate notice of capacity controls in frequent flyer programs.

Unlike the States, however, DOT must act consistently with the procompetitive policies of the ADA. The ADA itself specifically instructs that DOT "shall consider the following, among other things, as being in the public interest:"

> —The placement of maximum reliance on competitive market forces and on actual and potential competition (A) to provide the needed air trans-

[37] Since enactment of the ADA, the CAB and the DOT have on many occasions exercised that authority to require air carriers to post performance bonds. *See*, for example, CAB Order 99-1-28 (Jan. 19, 1979); CAB Order 79-2-22 (Feb. 6, 1979); CAB Order 79-11-116 and 79-9-68 (Sept. 27, 1979); CAB Order 81-9-105 (July 28, 1981); CAB Order 81-8-175 (Aug. 28, 1981); CAB Order 82-3-27 (Dec. 11, 1981) (requiring $1,000,000 bond); CAB Order 84-8-40 (Aug. 9, 1984), *rev'd on other grounds, First American Bank v. Dole*, 763 F.2d 644 (4th Cir. 1985); DOT order directing Braniff International to establish and file with DOT "an escrow account containing $6 million, or a surety bond in that amount." (April 2, 1992 letter from Jeffrey N. Shane to J .E. Murdock III, "Actions Required by Braniff International," at 2 (lodged with the Clerk of the Court)).

> portation system and (B) to encourage efficient and well-managed carriers to earn adequate profits . . .
>
> —The encouragement, development and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices and to determine the variety, quality, and price of air transportation services.

49 U.S.C. App. §§ 1302(a)(4) and (a)(9). Thus, in regulating allegedly unfair and deceptive airline practices, DOT must by law accommodate the ADA's procompetitive goals. DOT's views regarding the reasonableness of airline competitive practices warrant "substantial deference" because DOT "is equipped, *as courts are not*, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances." *Northwest Airlines, Inc. v. County of Kent*, 114 S. Ct. 855, 863 (1994) (emphasis added). DOT has both the duty and the expertise to police airline frequent flyer practices in a manner that is fair to consumers *and* consistent with the core policy objectives of the ADA.

In contrast, absent preemption under Section 1305, each State could entertain statutory or common law challenges to airline operations, and those challenges would be resolved without regard to their effect on competition.[38] DOT is required by law to strike an appropriate *balance* between the risks of unfair or deceptive practices and the need for a competitive and financially sound airline in-

[38] In deciding whether plaintiffs had established the elements of their state law claims, state coutrs could also ignore other important considerations federal agencies would be required to consider, such as the effect of a finding of liability on airline safety. For example, airlines know that the FAA and the DOT would encourage them to cancel particular flights if they had serious concerns about the safety of those flights. In state lawsuits by passengers whose flights were canceled, however, concerns about safety might not be a defense to a breach of contract action.

dustry. But States could choose to sacrifice competition, and to ignore the financial well-being of the airline industry, in an effort to eliminate even remote risks of consumer injury.

This point is forcefully illustrated by DOT's recent consideration of challenges to airline frequent flyer programs, *including challenges to the specific changes to the AAdvantage program that are at issue here. See* 1992 DOT Order 92-5-60 (May 29, 1992); Pet. App. 85a. The complaint alleged that several airlines had engaged in deceptive and unfair trade practices by providing "inadequate notice," as prescribed by the "NAAG Guidelines," that the airlines reserved the right to impose capacity control restrictions and blackout dates. Pet. App. 96a, 88a. The complaining parties referred specifically to *this case*, which was then pending in the lower courts in Illinois, as "the most significant [case] to this petition," Petition in Docket No. 47539, at 52-53 (citing and discussing *Wolens*). In their list of "changes in frequent flyer programs" that were allegedly unfair, deceptive, and imposed without adequate notice, they *expressly* referred to the changes American announced in May of 1988 that were, and *are*, the subject of this litigation.[39] DOT rejected those claims because the evidence failed to show "actual or potential deception," and there was no showing that "the actual notice given by any carrier is in fact inadequate." Pet. App. 97a. And DOT specifically found that capacity controls are not unfair to consumers. To the contrary, DOT concluded that capacity controls "[ap-

[39] Petition in Docket No. 47539, Appendix 3, at 2:

> 07/88 AAdvantage mileage devalued under guise of making it easier to earn awards: AA institutes a two-tier award strutcure that drastically raises earning levels for awards not subject to advance booking and capacity controls (AAnytime Awards); puts advance booking and severe capacity controls on Plan AAhead Awards, which are easier to earn.

Relevant excerpts from the papers filed in that proceeding have been lodged with the Clerk of the Court.

pear] to be legitimate methods for controlling the cost of frequent flyer [programs]," without which airlines might be forced to "terminate or cut back the programs" to the great detriment of consumers. Pet. App. 100a. In so ruling, DOT rejected the argument that Section 411 should be enforced without regard to its effects on competition in the market for air transportation services. As DOT held, "[a]dopting the more expansive interpretation of Section 411 proposed by the Association would frustrate Congress' decision that the public will benefit if airline fares and services are determined by market forces rather than government regulation." Pet. App. 101a (citations omitted).

Thus, failure to preempt respondents' claims would mean that the *same conduct* that has been found lawful by the DOT, and a legitimate method of competition under federal law, could nevertheless be challenged under state law, regardless of the effect such a challenge would have on American's ability to compete.

More generally, Congress and the DOT can be expected to act should any genuine threat to consumers arise. The airline industry is subject to intense and ongoing federal oversight. Four months after *Morales* was decided, Congress created the National Commission to Ensure a Strong Competitive Airline Industry,[40] and specifically directed the Commission to scrutinize frequent flyer programs.[41] After "careful examination," the Commission recommended no changes regarding "frequent flyer programs."[42] Nor did the Commission recommend any change in the scope of Section 1305 in light of *Morales*. Shortly thereafter, the Executive branch undertook its own study of the airline industry, culminating in a report entitled *The Clinton Administration's Initiative to Promote A Strong Competitive Aviation Industry* (U.S. Dep't of Transportation, Jan. 6, 1994). That report did not recommend any changes in the scope of preemption under Section 1305. Thus, Congress and the Administration are closely scrutinizing the airline industry, and can readily take any steps needed to protect consumers. They have not done so because frequent flyer programs provide substantial benefits to consumers, and airlines administer those programs fairly.

[40] The Commission was created by Section 204(b) of the 1922 Airport Act, *supra* note 4.

[41] It directed the Commission to "specifically investigate and study . . . (3) LEGAL IMPEDIMENTS TO A FINANCIALLY STRONG AND COMPETITIVE AIRLINE INDUSTRY.—Whether or not the Federal Government should take any legislative or administrative actions to improve the financial condition of the airline industry or to enhance airline competition, including whether or not any changes are needed in the legal and administrative policies which govern— . . . (D) frequent flier programs." *Id.*, § 204(d)(3)(D).

[42] Change, Challenges and Competition: A Report to the President and Congress, The National Commission To Ensure A Strong Competitive Airline Industry (August 1993), at 3.

CONCLUSION

The decision of the Illinois Supreme Court refusing to preempt respondents' damage claims should be reversed.

Respectfully submitted,

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No. 93-1286

In The

Supreme Court of the United States

October Term, 1994

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

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QUESTIONS PRESENTED

1. Does the Airline Deregulation Act of 1978, which contains no federal enforcement mechanism for breach of contract, preclude members of a frequent flyer program from bringing a common law breach of contract claim for money damages against an airline?

2. Does the Airline Deregulation Act of 1978 preclude members of a frequent flyer program from bringing a claim under a state consumer fraud statute against an airline when the airline's breach of contract constitutes a deceptive practice?

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OPINIONS BELOW

In addition to the opinions and judgments listed in the Brief for Petitioner ("Pet. Brief") at 1, the following relevant opinions and judgments have been delivered in this case: *Wolens v. American Airlines, Inc.*, 207 Ill. App. 3d 35, 565 N.E.2d 258 (1st Dist. 1990) (Pet. App. at 31a);[1]

[1] References to the Appendix to the Petition for Writ of Certiorari are cited as "Pet. App. at ___." References to the Appendix to Brief of Respondents in Opposition to Petition for Writ of Certiorari are cited as "Opp. App. at ___." References to the Joint Appendix are cited as "App. at ___."

Wolens v. American Airlines, Inc., No. 88 CH 7554, slip op. (Ill. Cir. Ct. March 20, 1989) (Pet. App. at 41a); and *Wolens v. American Airlines, Inc.*, No. 88 C 8158, 1988 U.S. Dist. LEXIS 12026 (N.D. Ill. October 25, 1988) (decision to remand state court action) (Opp. App. at 1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the express pre-emption provision of the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. App. § 1305(a)(1) ("Section 1305") (Pet. Brief at 2), the statutory section which saves existing remedies provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. App. § 1506 ("Section 1506").

STATEMENT OF THE CASE

Plaintiffs allege that Petitioner American Airlines unilaterally and retroactively breached its contract with Plaintiffs, members of American's "frequent flyer" club known as the AAdvantage Program. American's breach devalued credits already earned by Plaintiffs. The claims at issue seek money damages only.[2]

[2] While Plaintiffs initially sought injunctive relief, they have not appealed the holding of the lower court that the claim for an injunction is pre-empted.

This case is before the Court on a Motion to Dismiss Plaintiffs' complaints. Under Illinois procedural law, all well-pleaded facts in the complaints must be taken as true by the reviewing court and the allegations must be interpreted in the light most favorable to plaintiffs. *Munizza v. City of Chicago*, 222 Ill. App. 3d 50, 583 N.E.2d 561 (1st Dist. 1991), *citing*, *Bio-Medical Lab., Inc. v. Trainor*, 68 Ill. 2d 540, 370 N.E.2d 223 (1977) (motion to dismiss admits well-pleaded facts).[3] The complaints allege the following facts:

A. The AAdvantage Program.

American initiated the AAdvantage Program contract in 1981 as a marketing venture. To enhance the Program, American obtained the participation of non-airline businesses including hotels, bank credit cards, a long distance telephone network, car rental agencies, money market funds, sellers of merchandise and other airlines ("Program Participants" Pet. App. at 48a-49a, ¶ 1.

The relationship between American and AAdvantage Club members is contractual, with the terms contained in the terms and conditions of the AAdvantage Program. Pet. App. at 49a, ¶ 2. *See* AAdvantage Program Brochure

[3] Because this case involves the sufficiency of the complaints, Plaintiffs have not been able to create a record to refute the many untested (and largely irrelevant) factual assertions in American's brief. *See, e.g.*, Pet. Brief, *passim* (arguing that damage awards would inhibit competition, disrupt operations, and possibly lead to termination of frequent flyer programs); Pet. Brief at 6, 35 (arguing airline's administration of Program has benefited consumers); Pet. Brief at 14 (regarding how complying with contract would have impacted American).

("Program Brochure") lodged with the Court by American on June 2, 1994.[4] Under the contract, persons who belong to the AAdvantage club earn credits by doing business with American or Program Participants. AAdvantage club members can earn credits and obtain benefits without ever flying.[5] *See, e.g.*, Program Brochure; AAdvantage Mastercard/Visa Brochure, lodged with Court by American on June 2, 1994. Club members redeem the credits for various benefits offered by American and the Program Participants.

Plaintiffs joined the Program and accumulated credits from American and Program Participants, even if doing so was more costly and less convenient than doing business with others. Pet. App. at 49a-50a, ¶¶ 3-4; Pet. App. at 62a-63a, ¶ 5.

B. The Breach Of Contract

In late spring of 1988, after American had received the benefit of its bargain with club members, American retroactively imposed restrictions on members' use of their previously earned credits, unilaterally altering the

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[4] American's assertion that Plaintiffs allege an "implied contract" is incorrect. Pet. Brief at 3. The writings explaining the AAdvantage Program and setting forth its terms constitute an express contract.

[5] While non-airline travel benefits are involved in the AAdvantage Program, American claims that such benefits "were not challenged." Pet. Brief at 5. This is misleading. By breaching its contract with AAdvantage club members, American diminished the value of the credits which club members earned from the Program Participants as well as from American.

terms of its contract with the members.[6] Pet. App. at 52a, ¶ 14; Pet. App. at 65a, ¶ 14. These restrictions substantially reduced the value of credits members previously earned. Pet. App. at 49a-50a, ¶ 4; Pet. App. at 63a, ¶ 6.[7] Although American had reserved the right to restrict, suspend, or otherwise alter aspects of the Program prospectively,[8] it never reserved the right to retroactively diminish the value of the credits previously earned by members.

C. The Claims At Issue.

Plaintiffs, residents of Illinois, California, Connecticut and Texas, filed suit on behalf of themselves and all other club members. Plaintiffs allege that American's restrictions constituted a breach of contract and were a

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[6] Members no longer were entitled to an airplane ticket for any available seat on any flight at any time, but instead to only a limited number of seats designated on each flight (capacity controls). In addition, travel during popular holiday periods, previously available, was precluded (blackout dates).

[7] American misstates the *Tucker* complaint, asserting that Plaintiffs allege that American "raised the rate" for airline tickets obtained with AAdvantage credits. Pet. Brief at 8. Plaintiffs actually alleged that "American breached its contract" by, among other things, "reducing the number of available seats pursuant to which earned mileage credits can be used for benefits, thereby reducing the value of mileage credits. . . . " Pet. App. at 66a, ¶ 20.

[8] Thus, Plaintiffs do not request the state court to void any express limitations contained in American's AAdvantage Program contract. Plaintiffs only seek damages for breach of the express terms of that contract.

deceptive business practice violating the Illinois consumer fraud statute. Plaintiffs ask only for money damages resulting from American's wrongdoing.[9]

American justifies its retroactive unilateral changes to the AAdvantage Program by arguing that it did not anticipate the success of the Program. Pet. Brief at 6. However, whether American anticipated large accumulations of credits is outside the record and immaterial to whether Plaintiffs have the right to pursue their claim for damages, based on a private agreement. American created the Program, set the terms, and voluntarily contracted with club members. Moreover, American encouraged accumulation of large numbers of credits by making credits more easily obtainable through the use of credit cards, rental cars, hotels, long distance telephones, and other non-airline sources, as well as through promotions such as "triple mileage" where members obtained three times the normal credits. Pet. App. at 56a, ¶ 14. That American in hindsight believes it agreed to terms too generous is irrelevant.[10]

American's references to its desire to adjust the Program contract to achieve certain competitive goals are

[9] The complaints also pray for an award of punitive damages. Plaintiffs concede that punitive damages traditionally have not been recoverable for a simple breach of contract. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting). Consequently, the prayer for punitive damages in Count II should be stricken.

[10] While American suggests that its modifications to the AAdvantage Program have been beneficial (*see* Pet. Brief at 6), that assertion is not supported by any facts in the Record. Moreover, it is irrelevant to the predicate question of whether Plaintiffs can assert their claims.

also immaterial. *See* Pet. Brief at 15, 18-20, 27-29, 34. The claims do not seek to prevent American from changing the AAdvantage Program in any way. Plaintiffs are entitled to pursue their claim for damages based on the *retroactive* impact of the changes.

D. Judicial Proceedings

1. The District Court Remand.

Before filing its Motion to Dismiss, American removed the cases to the United States District Court for the Northern District of Illinois. The district court remanded, holding that American's pre-emption defense did not transform the state claims into federal claims. Opp. App. at 4a-6a.

2. The Illinois Supreme Court's Initial Decision.

After the trial court denied American's Motion to Dismiss (Pet. App. at 41a) and an intervening appellate court affirmed (Pet. App. at 31a), the Illinois Supreme Court held that Section 1305 did not pre-empt Plaintiffs' breach of contract and consumer fraud claims for money damages because those claims had only a "tangential relationship to (American's) rates and services. . . ."[11]

[11] While this basis for the Illinois Supreme Court's ruling proved to be consistent with the later construction of this Court in *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), the Illinois Supreme Court did err by holding that "Section 1305(a)(1) pre-empts claims only when the underlying statute or

The court also held that Section 1305 pre-empted Plaintiffs' claims for injunctive relief since such relief would effectively result in the regulation of American's services by a state court. Pet. App. at 23a.

3. The Illinois Supreme Court's Decision on Remand.

After *Morales*, the Court granted American's petition for certiorari and remanded to the Illinois Supreme Court for reconsideration in light of the Court's construction of Section 1305.

On remand, the Illinois Supreme Court reaffirmed that Plaintiffs' claims for money damages were not pre-empted:

> Accordingly, we conclude that our previous holding, that Plaintiffs' claims for money damages was not pre-empted because it bears only a *tangential* relation to airline rates, routes and services, comports with the *Morales* decision. As defined, the word "tangential" is described as: "touching lightly or in the most *tenuous* way: Incidental." (Emphasis added.) (Webster's Third New International Dictionary 2337 (1986).) . . . The claims are excluded [from pre-emption] by the exception carved out in *Morales* for actions only tenuously connected to the airlines' rates, routes and services.

Pet. App. at 6a-7a (emphasis added).

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regulation itself relates to airline services, regardless of whether the claim arises from the factual setting involving airline services." Pet. App. at 23a.

The Illinois Supreme Court closely followed *Morales'* analytical framework. Pet. App. at 3a-5a. The court first considered the nature of the contract that American breached and the wrongdoing complained of. Pet. App. at 5a-6a. The court described the claims, recounting Plaintiffs' contention that American retroactively changed the AAdvantage Program so as to diminish the value of AAdvantage club members' previously-earned credits. *Id.* The court also noted that the AAdvantage Program was developed and utilized as a marketing device, and that Plaintiffs did not seek any prospective relief. *Id.* Next, the court considered whether the damages claims were tenuous, remote, or peripheral to airline rates, routes and services. Pet. App. at 6a. The court found that the damages claims did not seek to establish the rates that airlines must charge, to determine the routes that airlines must fly, or to dictate the services that airlines must provide. *Id.* The court concluded that the "claims for money damages bear only a tangential, or tenuous, relation to American's rates, routes, and services." Pet. App. at 7a.

Despite American's contention to the contrary (Pet. Br. at 23), the Illinois Supreme Court did not create a new legal standard based on whether the state law claims relate to "essential" airline operations. While the court noted that the AAdvantage Program was not "essential" to airline operations, the court discussed that fact as one of many facts it considered in evaluating whether the Plaintiffs' claims fit into the "tenuous", "remote," or "peripheral" exceptions carved out in *Morales*.

SUMMARY OF ARGUMENT

American's AAdvantage Program is entirely voluntary (a consumer must fill out an application to join) and contractual, its terms being based on the rules, regulations and restrictions chosen solely by American.

Under the contract, members (Plaintiffs) received valuable credits exchangeable for various goods and services by agreeing to do business with American and the Program Participants. Members performed their end of the bargain by choosing American and the Program Participants over competitors even when the competitors' services or products were less expensive or more convenient.

In 1988, American breached its contract by unilaterally imposing capacity control and blackout date restrictions, decreasing the value of the credits which members had already earned. These restrictions violate the members' contracts only because they were imposed retroactively on credits previously earned by Plaintiffs. American reserved for itself the right to prospectively make changes in the contract terms to which the parties voluntarily agreed.

Plaintiffs seek to recover money damages for the diminution in value of their credits arising out of American's breach. Plaintiffs also seek damages pursuant to the Illinois Consumer Fraud and Deceptive Practices Act, for their accumulation of large numbers of credits through American's promotion of a triple miles program, when American knew it would shortly thereafter devalue the credits by imposing the restrictions.

American, attempting to avoid the consequences of its breach, claims that Section 1305(a)(1) of the Airline Deregulation Act of 1978 ("ADA") pre-empts Plaintiffs' causes of action because the contract relates to airline rates or services. This argument, which has failed at each previous judicial level, runs contrary to the language and purpose of the ADA, as well as this Court's ruling in *Morales v. Trans World Airlines*, 112 S. Ct. 2031 (1992). In enacting the ADA, Congress assumed the continued existence of private contracts and the continued existence of state law remedies for breach of contracts. Section 1305(a)(1) assures that the states will not "undo" the ADA's deregulatory purpose by imposing their own normative standards on airlines' rates, routes and services. *See Morales*, 112 S. Ct. at 2033.

The Program is a separate business run by American for itself and its Program Participants. Members need never fly to accumulate credits. The Program contract does not relate to the rates, routes or services of American's business of transporting persons and cargo in more than a remote, peripheral or tenuous manner, if at all.

Section 1305 shows no "clear and manifest" intent to prevent persons doing business with airlines from seeking compensatory damages to enforce the terms of voluntary contracts. Further, the ADA does not provide for any federal remedies or administrative procedures. Therefore, the ADA has not expressly supplanted common law claims.

Morales is similar to the case at bar only in that the issue there was the scope of Section 1305. In stark contrast with the proposed fare advertising regulations in

Morales, Plaintiffs' garden-variety breach of contract claims will not "undo federal deregulation." Plaintiffs seek only damages for American's past breach of the AAdvantage contract, unrelated to the air transportation rates, routes or services that Congress deregulated. Plaintiffs do not seek to create any rules, regulations or standards for American's future behavior, the types of normative standards which Congress intended to pre-empt.

American seeks immunity from its own wrongful conduct. That was not the intent which motivated Congress to enact Section 1305. Adopting American's argument that the ADA pre-empts all claims touching even indirectly on American's decisions as to its rates, routes or services would mean pre-empting virtually any claim one could conceivably have against an airline. Not only would members of the AAdvantage Program have no remedy for American's breach of contract, but no one else contracting with American would be able to enforce their agreements or receive monetary damages for American's breach. It is inconceivable that Congress intended, by *deregulating* the airline industry, to give the airlines immunity from suits narrowly based on their private agreements, especially when those agreements have no significant impact on the rates airlines charge, the routes they fly or the air transportation services they provide.

ARGUMENT

I. SECTION 1305(a)(1) DOES NOT PRE-EMPT STATE LAW CLAIMS FOR BREACH OF CONTRACT.

In *Morales*, the Court confronted the issue of whether the enforcement by state attorneys-general of comprehensive regulations pertaining to the advertising of airline rates was subject to pre-emption under Section 1305. The Court found the facts of *Morales* to present an extreme position on the pre-emption line, contrasted to gambling and prostitution, which were found to be on the opposite end of the spectrum. 112 S. Ct. at 2040.

The instant case presents circumstances which fall between the extremes. The question is whether Congress intended to pre-empt common law contract claims. Did Congress explicitly intend to strip away all state law protection? The answer is no, for the reasons we now explain.

A. The Statutory Language Of The ADA Manifests Congress' Intent That Plaintiffs' Breach Of Contract Claim Is Not Pre-Empted.

In enacting the ADA, Congress deregulated the airlines to promote "maximum reliance on market forces," and to further "efficiency, innovation and low prices" as well as "variety [and] quality of air transportation services." *Morales*, 112 S. Ct. at 2034. The principal goal of deregulation was to serve the interests of consumers by compelling airlines to compete in a free market with respect to their rates, routes and services.

Congress enacted Section 1305 to assure that states did not regulate airlines' rates, routes and services in an anti-competitive manner, with the effect of nullifying the dividends of deregulation. At the same time, Congress decided against repealing or limiting Section 1506 of the Federal Aviation Act of 1958 ("FAA"), Pub. L. No. 85-726, 72 Stat. 721, which expressly saves from pre-emption "the remedies now existing at common law or by statute."

Whether Congress intended to insulate airlines from the breach of their own voluntary agreements is the critical question in this case. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992) (congressional intent is the touchstone of the pre-emption inquiry). The Illinois Supreme Court's ruling that the Plaintiffs' suit for damages was not pre-empted by the ADA is fully consistent with congressional intent ascertained through the application of the facts of this case to pre-emption principles, the ruling in *Morales*, and the language and purposes of the ADA.

American argues, in substance, that Section 1305 pre-empts a cause of action that relates, in any way, to airline rates, routes and services. But that concept sweeps so expansively as to eliminate virtually any claim against an airline. Almost everything an airline does has at least a tenuous connection to its rates, routes or services. The ADA's language and policy demonstrate that such broad pre-emption was not Congress' intent.

1. In Determining The Meaning Of A Pre-Emption Provision, The Court Looks To A Number Of Sources.

While the Court considers the plain meaning of the words, it does not consider them in isolation, referring as well to "the purposes of the pre-emption provision, and the regulatory focus of [the statute] as a whole." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). The Court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987), *citing Kelly v. Robinson*, 479 U.S. 36, 43 (1986). *See also Watt v. Alaska*, 451 U.S. 259, 267 (1981) (statutes must be construed to give effect to all provisions if possible). The Court also considers congressional and regulatory interpretations of the statute. *See, e.g., Massachusetts v. Morash*, 490 U.S. 107, 116-17 (1989) (deferring to agency's interpretation of ERISA pre-emption language); *Cipollone*, 112 S. Ct. at 2620 (considering legislative history and purpose of Act).

If the Court finds that the pre-emption provision is "susceptible of more than one interpretation," it should conclude that the provision does not "demonstrate a clear and manifest congressional purpose" to pre-empt. *Hawaiian Airlines, Inc. v. Norris*, 62 U.S.L.W. 4537, 4540 (U.S. June 20, 1994) (Court considered statute's "comprehensive framework," which pre-empted many claims, in light of rest of statutory language as well as statute's purpose and legislative history; concluded Congress's intent to pre-empt particular claim at issue was not "clear and manifest", therefore state law claim was not pre-empted).

In this case, these sources establish that Plaintiffs' breach of contract claim is not pre-empted.

2. The Text Shows Congress' Intent To Preserve Breach of Contract Actions.

The ADA's text confirms the continued vitality of airline contracts.[12] As the Solicitor General argues, Congress contemplated that the airlines' services would be identified in its contractual agreements which would form the basis for calculating civil damages in the event the airline breached its voluntary contractual duties. Brief for the United States as Amicus Curiae ("Sol. Gen. Br.") at 19.

Private contracts are meaningless, however, unless there is a mechanism to enforce them or obtain damages

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[12] Section 1381 (Section 411 of the FAA), for example, provides that "[a]ny carrier may incorporate by reference in any ticket or other written instrument any of the terms of the *contract of carriage*." 49 U.S.C. App. § 1381(b) (emphasis added). Section 1371(q)(2), which provides for the filing of performance bonds, conditions such bonds upon "making appropriate compensation to such travelers . . . for failure on the part of such carrier to perform air transportation services in accordance with *agreements* therefore." 49 U.S.C. App. § 1371(q)(2) (emphasis added). Further, a "contract of carriage" is a contract for the "conveyance of property [or] persons . . . from one place to another." Black's Law Dictionary 269 (4th Ed. 1951). Any "contract of carriage" would "relate to" airline services by definition, under American's interpretation of Section 1305. Since such a reading is contrary to the statutory language, the pre-emption phrase of "relating to" must be limited by the type of state action pre-empted.

for their breach.[13] Indeed, the ADA assumes the binding character of airline contracts.[14]

At the same time Congress recognized the vitality of private contracts in the ADA, it did not create any federal remedies for breach of contract nor any administrative apparatus for the DOT to adjudicate a private contract dispute between an airline and a member of its frequent flyer club.[15] As the Solicitor General notes "to do so would be contrary to the ADA's basic deregulatory thrust." Sol. Gen. Br. at 22.[16] By recognizing the vitality of

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[13] American concedes that a "contract has no legal force apart from the law that acknowledges its binding character." Pet. Brief at 22 n.30.

[14] For example, the implication of Section 1371(q)(2)'s bond requirement and statements about compensation is that an airline's "failure" to comply with agreements would be subject to adjudication and that damages would be available for a breach. The bond requirement is similar to Section 1371(q)(1)'s requirement for insurance to ensure payment for negligence actions. *See Hodges v. Delta Airlines, Inc.*, 4 F.3d 350, 355 (5th Cir. 1993). Both sections assume the existence of common law actions.

[15] Federal common law would not be a source of recovery here. *See Miree v. DeKalb County*, 433 U.S. 25, 28-33 (1977) (holding that federal common law did not apply to contract dispute between county and Federal Aviation Administration); *O'Melveny & Myers v. FDIC*, 62 U.S.L.W. 4487, 4488 (U.S. June 13, 1994) (refusing to create federal common law on the question of the imputation of corporate officers' knowledge to a corporation). Thus, American would remove the only protection available to Plaintiffs, who have no other legal remedy for American's breach of contract.

[16] In this respect, the ADA differs radically from ERISA which provides for a federal cause of action, details available remedies and creates a comprehensive civil enforcement scheme. Thus, American's reliance on *Pilot Life Ins. Co. v.*

individual contracts without creating a federal enforcement mechanism, Congress demonstrated its intent to preserve the state's traditional role in enforcing contracts entered into by airlines. *Cf. Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837-38 (1988) (by recognizing that ERISA welfare plan benefits could be attached or garnished under state statute, Congress' decision to remain silent concerning an attachment or garnishment acknowledged or accepted the practice rather than prohibiting it).

That Congress intended airlines to be exposed to liability for breach of private contracts is further evidenced by Section 1506, first enacted in 1938 and then again in 1958. *See* FAA, Pub. L. No. 85-726, § 1106, 72 Stat. 798. Congress also chose not to repeal Section 1506 in enacting the ADA. Section 1506, which expressly preserves "the remedies now existing at common law or by statute" must be read in conjunction with Section 1305. Congress intended to preserve some common law and statutory actions despite Section 1305's pre-emption language. Given the purpose of the ADA to undo regulation over airlines' rates, routes and services, as the Solicitor General suggests, Section 1305 does not preclude the customary remedies to a party claiming that an airline breached a voluntary private contract with a customer,

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Dedeaux, 481 U.S. 41, 54 (1987) and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), is misplaced. Both cases are premised upon "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal [ERISA] scheme." *Pilot Life*, 481 U.S. at 54.

although it may bar a state from enforcing its own normative standards with respect to rates, routes, or services. Sol. Gen. Br. at 16-17. Section 1506 preserves "the customary remedies."

3. The ADA's Legislative History Demonstrates That Congress Intended To Pre-Empt Only State Actions Imposing Policy Standards On Airline Rates, Routes Or Services.

A section-by-section analysis of a precursor to the ADA (which included the provision ultimately codified as Section 1305) provides commentary on the purpose of the pre-emption provision:

> With the passage of legislation . . . loosening Federal regulation of airline services and fares, it is possible that some states will enact their own regulatory legislation, imposing restrictive utility-type regulation on interstate airline service and fares. The Air Service Improvement Act includes a specific statutory provision precluding state interference with interstate service and fares.

123 Cong. Rec. 30595 (1977) (comments of representative Glen Anderson). The House Report contains similar language:

> H.R. 12611 will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, *no state may regulate that carrier's routes, rates or services.*

H. R. Rep. No. 1211, 95th Cong., 2d Sess. (1978) at 16 (emphasis added). The conflicting regulations which the

pre-emption provision was intended to cure included carriers being required by states to charge different fares for interstate versus intrastate passengers. *Id.* at 16.

4. The DOT And The Solicitor General Support Plaintiffs' Right To Pursue Their Breach Of Contract Claim.

The DOT has consistently and without reservation stated that frequent flyer program contract disputes are private matters to be resolved in civil courts.[17] Indeed, American has repeatedly availed itself of state courts for common law claims relating to breaches of frequent flyer program contracts.[18]

DOT's ruling in *Complaint and Rulemaking Petition of Association of Discount Travel Brokers*, Docket Nos. 46280, 47539 (DOT Order, May 29, 1992) (Pet. App. at 85a), and the airlines' arguments in that matter, support Plaintiffs. The Association of Discount Travel Brokers, whose members purchase and sell frequent flyer awards, sought to

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[17] Sol. Gen. Br. at 26, n. 21, *citing* DOT Order Denying Rulemaking of May 29, 1992 (Pet. App. at 96a & n. 17) and DOT Order 89-9-25 of Sept. 13, 1989. *See also* United States Dep't of Transportation, *Plane Talk: Facts For Air Travelers From The Consumer Affairs Office* 2 (1992).

[18] *See, e.g., American Airlines, Inc. v. American Coupon Exch., Inc.*, 721 F. Supp. 61, 63 (S.D.N.Y. 1989) (finding that American's complaint contained "sufficient allegations of the existence of a contractual relationship between plaintiffs and frequent flyers who sold their travel rights. . . . "); *American Airlines, Inc. v. Platinum World Travel* (complaint filed in U.S. District Court for the District of Utah, alleging tortious interference and fraud). App. at 11-53.

require DOT to establish nationwide standards for frequent flyer programs. Pet. App. at 90a-91a. In opposing the proposed rulemaking, American argued, among other things, that DOT lacked jurisdiction to regulate frequent flyer programs since those programs extend beyond airlines. Pet. App. at 92a-93a.

Further, the airlines stressed that their agreements with members of their frequent flyer programs, which prohibit the purchase and sale of frequent flyer awards, were "valid and enforceable contractual restrictions on assignment. . . . " Pet. App. at 91a. The airlines described their frequent flyer programs as "legitimate contract[s]" governed "solely by contract law." Pet. App. at 89a. The DOT agreed:

> Continental correctly describes the relationship between frequent flyer programs and their members as a *contract* in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.

Pet. App. at 96a (emphasis added).

Contrary to American's argument (Pet. Brief at 33-34), the DOT did not consider the claims at issue here, nor did it conclude that an air carrier can breach its contractual obligations without being held liable for money damages under state law. DOT's statement, that certain methods of controlling the cost of frequent flyer programs are not *per se* illegitimate, is not conclusive here. The DOT did not address the question in this case: whether American can be held liable for damages under state law if its institution of cost controls breaches a contract. Indeed, the DOT order supports the conclusion

that state common law of contracts, rather than government regulation, should resolve that question.[19]

American suggests that Congress intended that the DOT would ensure appropriate compensation for breach of contract. Pet. Br. at 15. But neither Section 1371(q)(2), Section 411, nor any other provision of the ADA, anticipates or arranges for the DOT to adjudicate garden-variety contract disputes involving airlines.[20] In *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301-2 (1976), this Court flatly rejected American's construction of Section 411, holding that the Civil Aeronautics Board (DOT's predecessor) "may not employ its powers to vindicate private rights" and that "individual consumers are not even entitled to initiate proceedings under § 411."[21] By

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[19] American suggests that only federal *regulation* through DOT can assure a "competitive and financially sound" airline industry. Pet. Brief at 32-33. But the ADA *deregulated* the airline industry, as the DOT clearly recognizes, leaving airlines to compete in a free market, subject to common law breach of contract actions.

[20] American relies on a quote, taken out of context, from *Northwest Airlines Inc. v. County of Kent*, 114 S. Ct. 855, 863 (1994) for the proposition that DOT, rather than courts, should regulate the claims here. But *Northwest* dealt specifically with the agency's ability to oversee the setting of airport rates and fees – not the adjudication of breach of contract claims. Moreover, *Northwest* merely commented that it would have given deference to the agency had it ruled on the rate-setting issue; it did not pre-empt the private claim, and did not address the ADA's pre-emption provision.

[21] Moreover, to the extent Section 411 gives the DOT "authority" to protect consumers, exercise of that authority is entirely discretionary and the provision creates no private right of action for an aggrieved party.

enacting the ADA without altering Section 411, Congress is presumed to have adopted *Nader*'s interpretation of Section 411. *See Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978).

The DOT itself rejects American's interpretation. *See* Sol. Gen. Br. at 19-20. DOT regulations recognize state causes of action against airlines for breach of contract. The DOT says, for example, that airlines are *"subject to the contract law of the states* in issuing ticket contracts." 47 Fed. Reg. 52,129, 52,130 (1982) (emphasis added). DOT regulations require carriers to give passengers notice of "[r]ights of the carrier to change terms of the *contract*" and require carriers to notify passengers of the time period to *"bring an action* against the carrier for its acts." 14 C.F.R. 253.5(b)(3); 14 C.F.R. 253.5(b)(2) (emphasis added).

Moreover, nothing in the ADA suggests that Congress intended that the DOT be the sole arbitrator of the potentially thousands of contract disputes between airlines and passengers or anyone else (such as a frequent flyer club member) who contracts with an airline. The practicalities make it obvious that Congress could not have intended that result. As pointed out by the Solicitor General, the DOT does not have a comprehensive administrative apparatus for adjudicating disputes arising under contracts between airlines and their passengers. Rather, Congress intended to rely – as the DOT has relied – on the availability of state courts for the resolution of such disputes. *See* Sol. Gen. Br. at 3, 19, 25-27. It is inconceivable that Congress would create a burdensome regulatory scheme under the ADA without expressly providing for it. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*,

451 U.S. 630, 643-644 (1981) (finding no "unmistakably clear" expression of congressional intent to create a federal common-law right of contribution from antitrust co-conspirators).[22]

In summary, American's assertion that Section 1305 pre-empts "*any* causes of action that relate to rate, routes, or services" (Pet. Brief at 14) yields a ludicrous result: that Congress intended to pre-empt and at the same time endorse the continued existence of private contracts. Equally ludicrous, Congress could not have intended to eliminate "without comment . . . all means of judicial recourse" for breach of contract. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Construing the ADA to give effect to all of its provisions, and considering its lack of enforcement mechanisms, requires a finding that the ADA does not pre-empt breach of contract claims like the claim here.

B. Plaintiffs' Claim Does Not Implicate "Rates, Routes Or Services" And Is The Type Of Contract Claim Congress Intended To Preserve.

The Civil Aeronautics Board, in implementing the ADA, indicated that Congress extended pre-emption only

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[22] Even where Congress has developed a comprehensive mechanism for resolving disputes, the Court has found that particular claims are not pre-empted absent a clear and manifest expression of congressional intent to pre-empt them. *Hawaiian Airlines*, 62 U.S.L.W. 4537 (finding state tort and statutory causes of action alleging wrongful discharge from employment were not pre-empted despite the Railway Labor Act's "comprehensive framework" for handling labor disputes).

to the *quid pro quo* for the air passenger's fare, including the flight service, length and frequency of flights, seating assignments, and boarding practices. *See* 44 Fed. Reg. 9948, 9951 (1979).

The AAdvantage Program contract is unrelated to the *quid pro quo* for air transportation. The Program is a multimillion dollar marketing venture distinct from American's business of transporting passengers and cargo. Numerous non-airline businesses pay American to become Program Participants. *See* United States Dep't of Transportation, Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices* (Feb. 1990) at 32.

Members need not ever fly to accumulate credits and they can redeem credits for a variety of benefits unrelated to air travel. American has agreed to provide credits to club members who use an American vanity bank charge card, stay at certain hotels, rent cars, use a long distance network, invest in a specified money market fund, do business with a variety of Program Participants or fly. *See id.* at 32; Program Brochure.

More than seventy-five percent of airline passengers do *not* belong to frequent flyer programs (*id.* at 31), and club members and non-club passengers are subject to the same rates. Thus, while amicus United Air Lines argues that frequent flyer programs are integral to airline fares (United Brief at 6), in fact, the airfares and transportation services provided are the same regardless of whether the traveller is a member of the AAdvantage club.

American created – and voluntarily agreed to – the contractual terms of the Program completely apart from

the contract for air transportation. Plaintiffs' claim, relating only to the AAdvantage Contract, simply seeks money damages for the devaluation of already earned credits – it does not have any effect on American's flight services, seating assignments, boarding practices, prices, or any other aspect of the air transportation bargain.

Congress did not pre-empt claims relating to every conceivable business in which an air carrier chooses to participate. It confined pre-emption to claims relating to airline "rates, routes and services." Claims based on breach of the AAdvantage Program do not relate to rates, routes or services.[23] A "rate" is a "charge, payment or price fixed according to a ratio, scale or standard." *Webster's Ninth New Collegiate Dictionary* at 976 (1987). In the FAA, Congress refers to "rates" as something which an air carrier must "establish, observe, and enforce." 49 U.S.C. App. § 1374(a). In other words, the "rate" is a charge – set by American – which must be paid. Plaintiffs' claims here are unrelated to American's charges for any airline services; they do not seek damages for unfair or improper rates or changes to American's rate structure or fares. Instead, they seek damages arising from American's devaluation of the credits that Plaintiffs earned in performing their end of the bargain as members of the AAdvantage Program. This is distinct from the air transportation bargain.[24]

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[23] American does not argue that Plaintiffs' litigation relates to "routes." *See* Pet. Brief at 17-20.

[24] A substantial damage award in a negligence action or a breach of contract case could ultimately be reflected in a decision by American to increase rates. That, however, would not justify pre-emption. Virtually everything that affects a business may impact prices. Congress clearly did not pre-empt claims on everything related to airlines. *Cf. Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 488 U.S. 493 (1989) (although Natural Gas Act gave federal government exclusive authority to regulate rates for natural gas, state regulation of production of gas was not pre-empted even though it would have impact on costs and thus affect rates).

The damages Plaintiffs claim also do not relate to "services". The term "services" means the bargained-for provision of labor from one party to another. *Hodges v. Delta Airlines Inc.*, 4 F.3d 350, 354 (5th Cir. 1993). As described *supra*, CAB understood airline services to have this meaning – extending pre-emption only to the services constituting the *quid pro quo* for fares. By seeking damages for the devaluation of earned credits, Plaintiffs make no claims and seek no relief connected to American's air transport services.

If American's interpretation of the ADA were correct, then an airplane manufacturer could not sue an airline for failing to pay for an aircraft; a passenger injured or killed in an air crash could not sue the airline for negligence; a newspaper that is not paid for an airline's advertisement of rates could not enforce its contract and neither could a passenger whose paid ticket is not honored.[25] The list is endless – as virtually every activity in

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[25] It would be illogical to allow common law tort actions and pre-empt breach of contract actions as both are areas traditionally within a state's interest. Indeed, if any distinction is to be drawn, such distinction compels survival of common law breach of contract actions since a tort duty is not voluntarily entered into but imposed by state law. *See* Oliver Wendell Holmes, Jr., *The Common Law* at 77 (1938).

which an airline engages is connected, at least tenuously, to the rates the airline charges, the routes it flies, or the services it provides. If the "relating to" language is construed as American proposes, airlines would be free to breach contracts, act negligently or defraud people, without consequences.

C. Under *Morales*, Plaintiffs' Damage Claims Are Not Pre-Empted.

1. *Morales* Recognizes Limits To The Scope Of Pre-Emption Under Section 1305.

While American argues that this case is "indistinguishable" from *Morales*, Pet. Brief at 14, there is little similarity, and a multitude of significant distinguishing features. *Morales* involved the broad *regulation* of the advertising of *rates* by state attorneys-general who sought to *impose state policy* on the airlines as set out in a written standard of prosecutorial guidelines. The Court found that the prosecutorial guidelines "obviously" related to rates since they "establish binding requirements as to how tickets may be marketed if they are to be sold at a given price." 112 S. Ct. at 2039. The *Morales* Court stressed that the guidelines would not simply prevent "market distortion caused by 'false' advertising," but would restrict air carriers' "ability to communicate fares to their customers." *Id.* at 2040. Thus, *Morales* found the "[s]tate enforcement actions" to be pre-empted. *Id.* at 2037.

In contrast, Plaintiffs – private parties rather than the state – seek money damages, not regulation, resulting from a breach of a private contract implicating no state

policy. Their damage claim, unlike the claim in *Morales*, involves no "state enforcement action", no "restrictions" and no "binding requirements" on airlines' rates.

The Court explicitly recognized limits to pre-emption under Section 1305: " 'some state actions may affect [airline rates, routes, or services] in too tenuous, remote,, or peripheral manner' to have pre-emptive effect." *Id.* at 2040, *quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). The Court declined to establish a bright-line rule for distinguishing pre-empted claims from non-pre-empted claims. *Id.* at 2040. Perhaps the appropriate inquiry to draw such a line is found in *Morales'* assertion that Section 1305 was included in the ADA to "ensure that the states would not undo federal regulation with regulation of their own." *Id.* at 2034. State law claims which do not threaten to "undo federal regulation" should not be found to sufficiently relate to rates, routes and services.[26]

The Court made clear that it did not intend to "set out on a road that leads to pre-emption" of all state law claims touching on airline rates, routes and services. *Id.* at 2040. By declining to establish a bright-line rule, the

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[26] The *Morales* Court also analyzed whether the attorney general's claims had a "significant impact" or a "forbidden significant effect" on rates, routes and services. *Id.* at 2039, 2040. Several courts have followed *Morales's* "significant impact" inquiry. *See, e.g., Hodges v. Delta Airlines Inc.*, 4 F.3d 350, 355 (5th Cir. 1993) (tort remedies for personal injury did not have significant impact on services); *Doricent v. American Airlines Inc.*, No. 91-12084Y, 1993 U.S. Dist. LEXIS 15143, *16-*20 (D. Mass. Oct. 19, 1993) (claims for intentional infliction of emotional distress and violations of civil rights statute based on airline's treatment of passenger did not significantly impact rates, routes and services).

Court left to lower courts the evaluation of whether specific claims are pre-empted. That evaluation – whether the claims are tenuous, remote or peripheral to rates, routes and services or threaten to undo federal regulation – necessarily requires the lower court to evaluate the specific facts in each case. Thus, the *Morales* Court established a workable analytical framework.

2. Following the *Morales* Analysis, The Illinois Supreme Court Correctly Found That Plaintiffs' Breach of Contract Claim Was Not Pre-Empted.

Applying *Morales'* analytical framework, the Illinois Supreme Court held that Plaintiffs' ordinary claim for breach of the AAdvantage contract had only a "tangential" relation to American's rates, routes and services. Pet. App. at 7a. The Illinois Supreme Court evaluated the claim based on the facts alleged in the complaints, considering: (i) the mutual promises between American, its Program Participants and club members; (ii) American's retroactive change affecting earned credits; (iii) the Program's marketing purpose; (iv) the relief requested, limited to monetary damages; and (v) the fact that the AAdvantage Program was not essential to the airline's rates, routes or services. The court, following *Morales*, concluded that the claim was only tangentially connected to rates, routes and services and therefore was not pre-empted.

American ignores the enunciated basis for the Illinois Supreme Court's ruling, and suggests that Illinois created a requirement that Section 1305 pre-empts only those state law claims relating to "essential" airline operations.

While the court correctly characterized the AAdvantage program as not being "essential" to airline operations, its opinion makes clear that this characterization was merely one *fact* considered in the court's analysis, and not a new *legal* standard.

Unlike the proposed fare advertising regulations in *Morales*, Plaintiffs' straightforward breach of contract claim will neither "undo federal deregulation," *Morales*, 112 S. Ct. at 2034, nor impose restrictions on American's air transportation operations. American will continue to be free to advertise, set rates and offer routes and services in any way it pleases, subject only to its own voluntarily negotiated contracts.[27]

D. There Is A Strong Presumption Against Pre-Emption Of Plaintiffs' Breach of Contract Claim.

The Court starts by "presum[ing] that Congress did not intend to pre-empt areas of traditional state regulation". *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). *See California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (strong presumption against pre-emption of claims traditionally governed by state law). This presumption derives from the judiciary's "respect for the separate spheres of governmental authority preserved in

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[27] American's arguments about the dangers of airlines being compelled to displace revenue-generating customers is irrelevant to Plaintiffs' claim, which seeks no more than *money damages* for the diminution in value of their previously earned AAdvantage credits.

our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

The presumption against pre-emption is applicable to the garden-variety breach of contract and consumer fraud claims asserted by Plaintiffs. *See, e.g., Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (common law remedy for breach of contract not pre-empted; only clear and express statement pre-empts traditional state claim); *ARC America*, 490 U.S. at 101 (state common law and statutory remedies against unfair business practices not pre-empted as "area traditionally regulated by the States"); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146, *reh'g denied*, 374 U.S. 858 (1963) (state regulation preventing the deception of consumers not pre-empted).

When the Court construes a pre-emption statute "any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority." *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947). The party asserting pre-emption has the burden of proving Congress' "clear and manifest" intent to pre-empt. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). Traditional state common-law actions continue to exist unless Congress "expressly supplant[s]" them. *Id.*[28]

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[28] Contrary to amicus United Air Lines' argument, the presumption against pre-empting claims traditionally governed by state law applies to express pre-emption provisions. *See Cipollone*, 112 S. Ct. at 2618 (construing provision in light of presumption against pre-emption); *CSX Trans. Inc. v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) (Court should be "reluctant" to find pre-emption of state law claims; construing express pre-emption provision).

E. Allowing Compensatory Damages Claims To Go Forward Is Not Inconsistent With Pre-Emption of Injunctive Relief.

American argues that the damage claims cannot proceed because Congress intended to pre-empt Plaintiffs' claims for injunctive relief. *See* Pet. Brief at 24. Whether or not injunctive relief is pre-empted, ample evidence establishes that Congress intended the survival of common law state actions providing compensatory relief. As already noted, Sections 1381(b) and 1371(q)(2) expressly foresee private contracts. With no federal remedy, the ADA must have preserved state common law breach of contract actions. Congress, therefore, at a minimum, intended to "split" the remedies available from a state common law breach of contract action. *Silkwood*, 464 U.S. at 255.

Congress' principal concern in enacting Section 1305 was to ensure that states did not "undo" the statute by imposing regulations in the very areas that Congress had decided should not be subject to government interference. *Morales*, 112 S. Ct. at 2034. An injunction ordering an airline to seat certain passengers on particular flights could constitute impermissible government regulation. But requiring an airline to pay damages for a breach of contract would not impose any kind of restriction on the airline's rates, routes or services. Thus, it is reasonable to consider an injunctive claim separate from a damage claim for pre-emption analysis under Section 1305. *See*,

e.g., Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 301-02 (1976) (Court distinguished between causes of action based on relief, holding that common law compensatory damages were appropriate for state determination while injunctive relief was reserved for federal administrative action under Section 411).

American relies on *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959),[29] *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)[30] and *Cipollone v. Liggett*

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[29] This Court has previously explained that *Garmon* involves a special "presumption of Federal pre-emption" relating to the primary jurisdiction of the National Labor Relations Board. Because *Garmon* and its progeny have interpreted the NLRA as intending to fully occupy the labor field, these cases are not applicable here. In *Garmon* cases, the comprehensive reach of the NLRA creates conflicts with state laws and, hence, the need for pre-emption. *Brown v. Hotel & Rest. Emp. & Bart., Local 54*, 468 U.S. 491, 502 (1984); *English v. General Elec. Co.*, 496 U.S. 72, 86-87, n.8 (1990). Further, this Court has repeatedly held *Garmon* pre-emption analysis inapplicable in cases involving the "local interest exception." *International Ass'n of Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 138 (1976); *Sears, Roebuck & Co. v. Dist. Council of Carpenters*, 436 U.S. 180, 189 (1978) (state common law trespass action not pre-empted). Even in the labor area, the Court has refused to extend *Garmon* to pre-empt specific performance where "the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes. . . . " *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 16-19 (1974).

[30] *Ouellette* is distinguishable. There, Vermont landowners brought a nuisance suit seeking injunctive relief and damages against a paper mill in New York. The Clean Water Act ("CWA") specifically grants authority to the Federal Government and the *source State*. This Court held that any action brought in Vermont would frustrate the CWA but expressly noted that "[a]n action brought against IPC under New York nuisance law would not

Group, Inc., 112 S. Ct. 2608 (1992), as support for its argument that "this Court's pre-emption jurisprudence generally abjures distinctions based on the form of relief." Pet. Brief p. 24. These cases do not support American's position. In each case, the Court found that certain specific damage claims were an obstacle to federal laws or that federal law fully occupied the field. That is not the case here.

Under *Cipollone*, *only* state action which in fact implements state policy is pre-empted.[31] Compensatory damages for the breach of contract at bar does not involve the implementation of state policy, but instead makes available the traditional remedies for a breach of contract claim.[32] *Cipollone* supports the concept that common law

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frustrate the goals of the CWA." 479 U.S. at 498. The CWA, therefore, foresaw a forum for adjudication. The ADA, however, does not contain the explicit statutory language indicating a preference for a specific forum. No provision of the ADA expressly provides for federal adjudication of common law contract actions.

[31] In *Cipollone*, this Court held pre-empted those causes of action which relied on a breach of a duty imposed by state statute. This Court held that causes of action which relied upon a breach of a common law duty were not pre-empted.

[32] "[O]ur system of contract remedies is not directed at *compulsion of promisors* to prevent breach; it is aimed, instead, at *relief to promisees to redress* breach." E. Allen Farnsworth, *Contracts* § 12.1, at 840 (2d ed. 1990) (emphasis in original). Unlike other areas of law, contract law relates to "the nature and extent of the rights and duties that the parties themselves have created." *Id.* § 7.1, at 463. Even in the labor field, the *Garmon* pre-emption analysis has been held inapplicable to the enforcement of contracts voluntarily entered into. *Belknap, Inc. v. Hale*, 463 U.S. 491, 512 (1983).

contract actions survive pre-emption.[33] As Justice Stevens noted, "a contractual requirement, although only enforceable under state law, is not 'imposed' by the state, but rather is 'imposed' by the contracting party upon itself." *Cipollone*, 112 S. Ct. at 2622 n. 24.

Unlike *Garmon* and *Ouellette*, which involved pervasive federal regulatory schemes, this case involves *de*regulation and a statute that presumes continued state remedies. *Cf. Silkwood*, 464 U.S. at 256-58 (even with extensive federal regulations, damage claim could proceed). No evidence supports American's illogical contention that Congress intended to pre-empt compensatory damages for a breach of contract any more than it intended to pre-empt personal injury claims.

American further argues that compensatory damages have as regulatory an effect as injunctive relief and therefore should be pre-empted. However, none of the cases relied on by American supports the proposition that damage claims are pre-empted merely because they may possibly have regulatory effect. In each case the court found that the damage claims were either expressly pre-empted or impliedly pre-empted because they were an obstacle to federal law or federal law had fully occupied the field. Moreover, while *Garmon* held that regulation "can" be exerted through a damage award as well as an injunction,

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[33] Arguably, *Cipollone* supports the proposition that all state remedies for a breach of contract are permissible. *Accord Belknap*, 463 U.S. at 512 (implying specific performance available remedy); *William E. Arnold Co.*, 417 U.S. at 16-19 (1974) (holding *Garmon* did not pre-empt specific performance of contract).

it did not hold that *all* damage awards necessarily have such effect.

II. ERISA PRE-EMPTION SHOULD BE DISTINGUISHED FROM ADA PRE-EMPTION.

American suggests that in interpreting the ADA's pre-emption provision, the Court should adopt in its entirety its previous interpretations of ERISA's pre-emption provision. *See* Pet. Brief at 16, 18, 21, 24. While *Morales* compared the "relating to" language in the ADA to the "relating to" language in ERISA, the pre-emption analysis should not stop there. To determine whether Congress intended the ADA's pre-emption provision to have the same meaning as ERISA's pre-emption provision, the Court should compare not only two words in the pre-emption clauses, but also the rest of those provisions, other language in the statutes, and the purpose, civil enforcement schemes, and legislative history of the statutes.[34] An analysis of these factors demonstrates that while most breach of contract/enforcement actions are pre-empted under ERISA, Plaintiffs' claims are not pre-empted under the ADA.

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[34] This Court has limited the scope of ERISA pre-emption based on these factors. *See, e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 841 (1988) (ERISA did not pre-empt state's general garnishment statute even though it was applied to collect judgment against plan participants); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987) (state law requiring payment of severance benefits, which would normally fall within purview of ERISA, not pre-empted because only state laws that relate to benefit "plans" are pre-empted and because state law did not require establishment or maintenance of ongoing plan).

The explicit purpose of ERISA is "to protect *contractually* defined benefits." *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (emphasis added), *citing Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985) and 29 U.S.C. § 1001. *See also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 & n.5 (1981) (Congress wanted to ensure in ERISA that workers received contractual or promised benefits), *citing Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). This purpose, along with a detailed federal scheme to enforce contracts, supports the Court's conclusion that Congress intended to pre-empt state law breach of contract actions in areas covered by ERISA.

In contrast, the express purpose of the ADA is wholly unrelated to the enforcement of contractual obligations at the federal level. Rather, the ADA's purpose is to promote "maximum reliance on competitive market forces," and to further "efficiency, innovation, and low prices" as well as the "variety [and] quality . . . of air transportation services." *See Morales*, 112 S. Ct. at 2034, *quoting*, 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9). This purpose is served – not impeded – by state law breach of contract claims that seek only to enforce terms voluntarily agreed to by an airline.

The ADA and ERISA also differ markedly with respect to the enforcement schemes to remedy breaches of contract. Under ERISA, Congress crafted a "detailed," "comprehensive," and "carefully integrated" civil claims and enforcement procedure. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); 29 U.S.C. § 1132. *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (enforcement scheme is "essential tool" to accomplish ERISA's purpose). The existence of this comprehensive

civil enforcement scheme has been a critical factor in finding that ERISA's pre-emption clause sweeps widely. *See Ingersoll-Rand*, 498 U.S. at 143-45 (finding ERISA's comprehensive and detailed civil enforcement mechanism to be a "special feature" supporting pre-emption of common law wrongful discharge action).

The ADA contains no such "detailed, "comprehensive," and "carefully integrated" civil enforcement scheme to enforce contractual rights. At the same time, the ADA assumes the continued existence of contracts. *See supra* at 16-17. The lack of enforcement scheme demonstrates that Congress expected that state law breach of contract actions would provide the mechanism to deal with breach of contract claims, so long as the claims did not conflict with the ADA's deregulatory purpose.

American contends that Section 411 (49 U.S.C. App. Section 1381) and Section 1371(q)(2) provide "ample authority for the DOT to protect consumers should the DOT determine such protection is needed". Pet. Brief at 31. But those sections are discretionary to the DOT, and contains no reference to complaints from passengers, let alone members of frequent flyer clubs. As described *supra* at 16-17, 22-23, those sections provide no mechanism for consumers to pursue their rights.[35] The DOT itself has rejected American's contention. *See supra* at 23.[36]

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[35] In contrast, ERISA provides for both administrative enforcement, to address cases with broad policy implications, and private enforcement lawsuits, to address run-of-the-mill contract disputes.

[36] The legislative history of the ADA and ERISA highlights their differences on pre-emption. ERISA's legislative history

III. SECTION 1305(a)(1) DOES NOT PRE-EMPT PLAINTIFFS' CONSUMER FRAUD ACT CLAIM.

American and the Solicitor General both misperceive the nature and scope of Plaintiffs' claim under the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 I.L.C.S. § 505/1 *et seq.* Like the claim for common law breach of contract, this claim does not relate to an airline's rates, routes or services except in a manner which is tenuous, remote and peripheral. *See supra* at 24-27, 30-31. Plaintiffs allege that American's conduct, which constituted a breach of the contract between members and the AAdvantage Program, included a deceptive practice subject to money damages under the Consumer Fraud Act.[37]

Unlike the regulation at issue in *Morales*, the Consumer Fraud Act claim does not require, nor purport to

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demonstrates that Congress intended to create a federal scheme to replace state law claims relating to breach of employee benefit contracts. *See Pilot Life*, 481 U.S. at 46 (citing Congressional Record statements). In contrast, the ADA's legislative history contains no evidence that Congress intended Section 1305 to pre-empt state law claims relating to private contracts. It indicates only a legislative intent to prevent states from enforcing normative utility-type regulations on airlines' rates, routes and services. *See supra* at 19.

[37] The Solicitor General incorrectly argues that the Consumer Fraud Act claim challenges the adequacy of American's prior notice. Sol. Gen. Br. at 10. However, the claim is based on the fact that offering a triple miles bonus, when American already had plans to institute capacity control restrictions and blackout dates, was a deceptive practice.

regulate,[38] either American's ability to determine the terms of the AAdvantage Program or the content of its communications concerning the Program. American's deceptive treatment of the AAdvantage contracts has nothing whatsoever to do with any legitimate industry-wide practice of airlines. Imposing liability for American's deceptive conduct under Illinois law would not "significantly impact" American's ability to administer its services or set rates.

Plaintiffs' claim would, however, require American to conduct itself with respect to the AAdvantage contracts without unfair deceptive business practices. Congress intended exactly that impact when it enacted Section 411 in 1938. Under Section 411, states share with the federal government regulatory authority over unfair and deceptive business practices. When Congress passed the FAA in 1958, it reenacted Section 411 with the shared authority intact. Congress again left the section unchanged when it adopted ADA in 1978. Then, in the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703, Congress transferred administrative responsibility over Section 411 from the CAB to the DOT, again without altering its substance.

Thus, from its initial enactment through today, Section 411 has served to supplement, not displace, statutory causes of action challenging unfair and deceptive practices in the airline industry. *Nader v. Allegheny Airlines,*

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[38] Not all state regulation of airline advertising, let alone regulation of unfair and deceptive business practices, is pre-empted under Section 1305, especially if it fails the "significant impact" inquiry of *Morales*. 112 S. Ct. at 2040.

Inc., 426 U.S. 290, 303 (1976) (Section 411 "does not represent the only, or best, response to all challenged carrier actions that result in *private* wrongs"). This result is consistent with the interpretation of Section 411's model – Section 5 of the Federal Trade Commission Act – which coexists with state laws against deceptive trade practices. *See Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

Plaintiffs' Consumer Fraud Act claim for damages does not threaten the federal goals of deregulation. Rather, concurrent federal and state jurisdiction to challenge unfair or deceptive practices, like the practice here, has been the norm since Congress first enacted Section 411. Since the Consumer Fraud Act claim, like the contract claim, is at most only tenuously connected to rates, routes or services, it is not pre-empted under Section 1305 or under *Morales*.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

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No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMERICAN AIRLINES, INC.,
Petitioner,
v.
MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

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REPLY BRIEF

There is little dispute that respondents' Consumer Fraud Act damage claims have an obvious "connection with or reference to" American's rates and services, and are therefore preempted by Section 1305. *See Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992).[1] *Amicus* the United States agrees that those statutory claims are preempted, U.S. Br. at 10-15, and respondents have raised only a *pro forma* defense of those claims at the end of their brief. *See* Resp. Br. at 40-42.

Respondents' common law contract claims equally "relate to" American's rates and services, and respondents have made no substantial argument to the contrary. Those claims have precisely the same "connection with or reference to" American's rates and services as do the statutory claims. A damages award on the contract claims would have precisely the same impact on American's rate and

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[1] On July 5, 1994, Section 1305 and other transportation provisions were revised and codified without substantive change. PL 103-272, 108 Stat. 745. *See* the statutory appendix to this reply.

service decisions as would a damages award on the statutory claims. The Illinois Supreme Court held, and respondents concede, that the same contract claims—based on the same facts and the same state law—did "relate to" American's rates and services insofar as they sought injunctive relief. Preemption does not depend on the form of relief requested, or on the label plaintiffs choose for their claim. *See* Amer. Br. at 24-25. Thus, the Illinois Supreme Court's refusal to preempt respondents' contract damage claims must be reversed.

The United States agrees that respondents' contract damage claims "relate to" American's rates and services within the meaning of Section 1305, and acknowledges that the phrase "enforce any law" in Section 1305 *was* intended by Congress to encompass and preempt common law enforcement of contract damage claims that "turn upon state policies that are independent of the intent of the parties." U.S. Br. at 29-30.[2] The United States argues, however, that "any law" should be narrowly construed to exclude from preemption common law enforcement of "terms agreed to by private parties," and urges a remand to determine whether respondents' contract claims are preempted under this test. U.S. Br. at 17.

No remand is necessary. The government's reading of Section 1305 flatly contradicts the settled, ordinary meaning of "law" as repeatedly interpreted by this Court. Nothing in the legislative history suggests that Congress intended to exclude contract claims enforcing contractual obligations from Section 1305, and the United States does not contend that such a construction is necessary to further ADA's purposes. It claims only that rewriting Section 1305 in this way would be more "consistent" with

[2] Even respondents agree that Section 1305 "assures that the states" will not impose "their own normative standards," and agree that Section 1305 "may bar a state from enforcing its own normative standards" in a breach of contract action. Resp. Br. at 11, 19. They argue, however, that their contract claims do not involve "the types of normative standards which Congress intended to preempt." *Id.* at 12.

ADA's purposes. U.S. Br. at 17. Even if correct, that argument would not justify disregarding the statute's clear and ordinary meaning. And the argument is wrong. The construction urged by the United States *impairs* the ADA's core objectives in much the same way the narrow construction of Section 1305 rejected in *Morales* would have impaired those objectives.

In any event, respondents' contract claims would be preempted even under the test proposed by the United States because those claims inescapably depend on state policies that are independent of the intent of the parties. Indeed, the state court cannot reach the merits of respondents' claims unless it first invalidates or limits the express reservation of the right to change AAdvantage Program rules contained in AAdvantage contracts. Furthermore, because respondents do not allege that American expressly promised to make available any seat on any flight, and because respondents' claims rest solely on *unilateral* offers, the contractual obligation respondents posit will exist, if at all, only as a result of normative state policies. *See* pages 17-19.

I. RESPONDENTS' CLAIMS PLAINLY "RELATE TO" AMERICAN'S RATES AND SERVICES UNDER *MORALES*.

There can be no serious dispute that all of respondents' claims "relate to" American's rates and services under *Morales*. Respondents argue that the connection is tenuous—akin to that of gambling or prostitution laws. Resp. Br. at 13. But as the United States correctly observes, respondents' claims "directly attack" American's rates and " 'quite obviously' relate to rates and services because, as pleaded by the respondents, they expressly 'bear[] a "reference to" ' rates and services." U.S. Br. at 12 (quoting *Morales*). Furthermore, " 'as an economic matter,' " respondents' claims have the same " 'forbidden significant effect' " as the consumer protection law preempted in

Morales. U.S. Br. at 8, 13 (quoting *Morales*).[8] *Morales* thus requires preemption of respondents' claims.

Any other result would seriously undermine the effectiveness of Section 1305. Respondents' claims, brought on behalf of a nationwide class of four million people, are an effort to regulate the competitive decisions airlines make regarding the terms of their frequent flyer programs. Respondents challenge a fundamental economic and competitive decision American made regarding the management of its inventory of available seats.[4] That is precisely the type of competitive decision Congress wanted to insulate from state interference. Accordingly, respondents' challenge is precisely the kind of challenge that can and should be resolved at the federal level if ADA's procompetition objectives are to be achieved. Indeed, DOT *has* entertained challenges to the *very same* conduct that is challenged here, and found that conduct to be procompetitive and nondeceptive. *See* Amer. Br. at 33.

The regulatory effect of respondents' claims is underscored by respondents' invocation of the "public law mechanism[]" of a class action, which serves principally to regulate "systematic practices that violate external substantive norms."[5] Class actions function as a surrogate for direct regulatory enforcement by administrative

[3] It is irrelevant whether members "need never fly to accumulate credits," Resp. Br. at 11, because respondents have not challenged that aspect of the AAdvantage program in their pleadings. Here, respondents seek to redeem their mileage credits for "free air travel on any available date . . . for any available seat in the class of service provided." Pet. App. 52a.

[4] See Brief Amicus Curiae of Air Transport Association of America (No. 93-1286) ("ATA Amicus Br.") at 4, 5 ("airlines compete intensely with each other" regarding the changing "benefits and restrictions in their frequent flyer programs"); *id.* at 10-11 (giving examples).

[5] David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 851, 907 (1984).

bodies.[6] Furthermore, class actions by "private Attorneys General" serve much the same deterrence objective as do punitive damages. Both are authorized by state law to further state substantive policies.[7] Thus, the Illinois statute which authorizes class actions is based on the state judgment that allowing individual consumers to aggregate their claims in a class action will *deter* conduct that *might* be found to constitute consumer fraud or breach of contract, thereby regulating such conduct without the necessity for direct administrative action. Kenneth P. Ross, *Multistate Consumer Class Actions in Illinois*, 57 Chi.-Kent L. Rev. 397, 397-398 (1981) ("the threat of recoveries by large classes of disgruntled consumers acts as a strong deterrent"). Class actions challenging changes in airline rates and services plainly further state substantive policies of *deterring changes* in airline rates and services that *might* be found to constitute consumer fraud or breach of contract.

Respondents' contract claims and statutory claims are indistinguishable and must be treated identically under Section 1305. Both challenge the same conduct, and involve the same issue. Respondents acknowledge they are "bringing a claim under a . . . statute . . . when the airline's breach of contract constitutes a deceptive practice." Resp. Br. at i. Indeed, the contract claim cannot proceed unless American's exercise of its express reservation of the right to change the AAdvantage program—the very provision challenged in respondents' statutory claim—is found arbitrary, unfair, or otherwise unenforceable as a matter of state law.

Functionally, the statutory and contract claims have precisely the same connection with and reference to

[6] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1291 (1976); W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 Am. U. L. Rev. 573, 592 (1990).

[7] Although respondents have now abandoned punitive damages under their contract claim, they still seek punitive damages under their statutory claim. *See* Resp. Br. at 6, n.9.

American's rates and services, and would have precisely the same impact on those rates and services. Different labels do not change the nature of the challenge. Consumer fraud claims can easily be packaged as contract claims, and the two claims are frequently pled together.[8] If respondents' statutory claim is preempted, as the United States contends, allowing their challenge to proceed as a contract claim would hold federal policy hostage to artful pleading.

Similarly, respondents' argument that they only seek damages based on the "retroactive impact" of the 1988 changes to the AAdvantage program rules, *see* Resp. Br. at 7, is irrelevant, and wrong. Even if respondents' description were accurate, their claims would still "relate to" American's rates and services, and would therefore be preempted by Section 1305. Furthermore, the "impact" of the May 1988 announcement that future flights may be subject to capacity controls was not "retroactive." No class member would be affected by that change unless American actually imposed capacity restrictions on flights class members wanted to take after May 1988. Because decisions regarding capacity controls are driven by competitive considerations, these decisions change from flight to flight and from hour to hour.[9] Respondents' claims therefore have a continuing and prospective effect on American's competitive decisions because American's damages exposure has depended, and continues to depend, entirely on the extent to which American actually imposes capacity controls. *See Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959)

[8] *E.g., Gordon v. Boden*, 586 N.E.2d 461 (Ill. App. 1991), *appeal denied*, 591 N.E.2d 21 (Ill. 1992), *cert. denied*, 113 S. Ct. 303 (1992); *Miner v. Gillette Co.*, 428 N.E.2d 478 (Ill. 1981), *cert. granted*, 456 U.S. 914 (1982), *cert. dismissed*, 459 U.S. 86 (1982). Both claims have been raised in actions against other airlines in Illinois courts. *See* Brief of Amicus Curiae United Air Lines, Inc. (No. 93-1286) ("United Amicus Br.") at 1-2.

[9] *See* United Amicus Br. at 9-12.

(state "regulation can be as effectively exerted through an award of damages as through . . . preventive relief").

Because respondents cannot prevail under *Morales*, they reargue much of what *Morales* settled. They argue that Section 1305 was meant to do no more than place airlines in the same position as other deregulated industries, subject to the general laws of the states. *Morales* squarely rejected that argument, however, and held that air fare advertisements could *not* be subject to otherwise applicable state consumer fraud laws. Similarly, the legislative history respondents quote, Resp. Br. at 19-20, was addressed to an earlier bill that preempted only state laws "determining" rates, routes, or services. As *Morales* explained, that legislative history is irrelevant because Congress specifically rejected "determining" and substituted the broader "relating to" language. 112 S. Ct. at 2038 n.2. Respondents' reliance on Section 1506—the "savings clause"—is also foreclosed by *Morales*. Section 1506 "cannot be allowed to supersede the specific substantive pre-emption provision" contained in Section 1305. *Id.* at 2037. And contrary to respondents' arguments, preemption of state law does not leave consumers unprotected because, as *Morales* stressed, DOT has ample authority to protect consumers. *Id.* at 2040.

Respondents seek to divert attention from *their* claims by contending that any test that preempts their claims would necessarily preempt an "endless" list of other, quite different, claims. Rep. Br. at 27-28. That is wrong. As construed in *Morales*, Section 1305 preempts only state laws that relate in a more than tenuous way to the terms and conditions on which airlines compete for passengers.[10] In general, if enforcement of the state law at issue is

[10] In *Morales*, the United States correctly argued that Section 1305 preempts enforcement of state laws that relate to "the three basic areas in which airlines compete," because such laws "could interfere with the pro-competitive policies that federal authorities were directed by Congress to implement." Brief for the United States As Amicus Curiae In Support Of Respondents (No. 90-1064) at 9, 25.

likely to interfere with or change the competitive decisions airlines have made or would otherwise make regarding the rates, routes, or services they offer the public, the law is probably preempted; if not, the law is probably not preempted. The key concept, which is faithful to both the text and purpose of the ADA, is whether enforcement of the state law is likely to impact competitive decision-making. Here, it plainly would. In most of the hypothetical situations posited by respondents, it plainly would not. Thus, whatever the outer boundaries of Section 1305, *respondents*' claims fall squarely within the core area of congressional concern, and "do[ ] not present a borderline question." *Morales*, 112 S. Ct. at 2040 (quotation omitted).

II. THE PHRASE "ENFORCE ANY LAW" IN SECTION 1305 ENCOMPASSES COMMON LAW ENFORCEMENT OF CONTRACTUAL OBLIGATIONS.

The United States agrees that respondents' contract claims "relate to" American's rates and services. It argues, however, that the phrase "enforce any law" in Section 1305 should effectively be re-written to exclude common law enforcement of "agreed-upon terms". U.S. Br. at 21. There is no support for that argument in the statutory text, the legislative history, or in considerations of public policy and practical administration.

A. The Text of Section 1305 Does Not Exclude Enforcement of Obligations Imposed by Contract.

Section 1305 expressly preempts state enforcement of "any law" when its "particularized application" relates to airline rates, routes, or services. *See Morales*, 112 S. Ct. at 2038. That statutory language does not admit of a distinction between common law enforcement of normative policies and common law enforcement of contractual obligations. As the Court noted in *Cipollone*, "[a]t least since *Erie R. v. Tompkins*, 304 U.S. 64 . . . (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." 112 S. Ct. at 2620. Thus, the "natural" meaning of "law" encompasses

common law claims. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99-101 (1972). "The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts," *Warren v. United States*, 340 U.S. 523, 526 (1951), including "judicial enforcement of private agreements." *Shelley v. Kraemer*, 334 U.S. 1, 14, 20 (1948) (common law enforcement of voluntarily assumed contractual obligation is state "law" under Fourteenth Amendment).

This Court's decision in *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991), squarely confirmed that settled understanding. The issue was whether the phrase "all other law" in 49 U.S.C. § 11341(a) preempted enforcement of private contracts. At the urging of the United States, the Court held that the phrase "means what it says," and "include[s] laws that govern the obligations imposed by contract." 499 U.S. at 129.[11]

> A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption . . . from 'all other law' effects an override of contractual obligations . . . by suspending application of the law which makes the contract binding.

Id. at 130. The United States notes the relevance of *Norfolk & Western*, but makes no effort to distinguish that case. U.S. Br. at 18, n.10. *Norfolk & Western* expressly relied on an even earlier case, *Schwabacher v. United States*, 334 U.S. 182 (1948), in which the Court held that a precursor of Section 11341(a) preempted state enforcement of voluntarily assumed contractual obligations. *Norfolk & Western*, 499 U.S. at 130-31.[12] Thus,

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[11] *See* Brief for the Federal Respondents in Nos. 89-1027 and 89-1029, at 18 ("[t]he exemption from 'all other law' is easily sufficient to embrace those laws governing the obligations of parties to contracts"). The United States argued that the statutory text was "dispositive." *Id.*

[12] In *Schwabacher*, holders of preferred stock in a railroad company had contested an ICC-approved merger with another railroad, claiming the merger would deprive them of their state-law contrac-

long before passage of the ADA in 1978, the Court had made clear that the ordinary meaning of "law" encompasses common law enforcement of contractual obligations.

Express preemption provisions like Section 1305 are to be given their ordinary, natural meaning "unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). In *Morales*, the Court interpreted the language of Section 1305 using the "assumption that the ordinary meaning of that language accurately expresses the legislative purpose." 112 S. Ct. at 2036. Since then, Congress has twice revised Section 1305, and far from questioning the Court's analysis, has endorsed "the broad preemption interpretation adopted by the United States Supreme Court in *Morales*."[13] The congressional confirmation that the language of Section 1305 should be given its ordinary, broad meaning should end the inquiry because the ordinary meaning is "conclusive" "absent a clearly expressed legislative intention to the contrary." *Consumer Product Safety Com'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *INS v. Cardozo-Fonseca*, 480 U.S. 421, 433 n.12 (1987). Even apart from congressional confirmation, this principle of statutory interpretation applies with special force to Section 1305. It would be strange indeed if Congress intended the words "relating to" to have a "broad" and "deliberately expansive" scope that is "conspicuous for its breadth," as *Morales* held, 112 S. Ct. at 2037, yet intended the words "any law," in the same statutory sentence, to have an unusually restrictive meaning.[14]

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tual right to be paid the "full" value of previously accrued but unpaid dividends. 334 U.S. at 185, 188, 201.

[13] H.R. Conf. Rep. No. 103-677, 103d Cong. 2d Sess. 83 (1994) (accompanying H.R. 2739). H.R. 2739 was passed as the Federal Aviation Administration Authorization Act of 1994. That Act adds a new paragraph to Section 41713(b), the codified version of Section 1305. *See* the statutory appendix to this reply.

[14] In *Morales*, the United States quite properly relied on the broad, ordinary meaning of "any law," and the fact that Congress used those words "without referring to any functional subcategory of those laws," as a structural reason for a broad interpretation of "relating to." Brief for the United States As Amicus Curiae Supporting Respondents (No. 90-1604), at 13; *id.* at 10. Here, the United States is urging the Court to create "functional subcategories" of common law contract claims.

There is certainly no "clearly expressed" legislative intent to restrict the ordinary meaning of "any law." Nothing in the legislative history suggests that Congress intended to preempt state enforcement of some contract claims, but not others, depending on "the extent to which" the claims rely on state policies. U.S. Br. at 30. The United States urges this distinction because the legislative history evinces no specific congressional intent to include enforcement of private contractual obligations. *Id.* at 9. That argument should be rejected, as it was in *Norfolk & Western*, 499 U.S. at 125, 128, because it inverts the governing presumption that statutory terms will be given their ordinary meaning *unless* there is clearly expressed legislative intent to the *contrary*.

Tellingly, the only authority cited to support the United States' restrictive reading of Section 1305 is a quotation taken entirely out of context from the plurality opinion in *Cipollone*: "a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . *imposed under state law*.'" 112 S. Ct. at 2622. *See* U.S. Br. at 21. That sentence in *Cipollone* did not purport to interpret the phrase "any law" because the statute at issue there preempted only "requirements or prohibitions imposed under state law." The *Cipollone* plurality said only that a voluntarily undertaken obligation is not a "requirement imposed under state law," and thus was not preempted under the very different statute at issue in that case.

The argument for rewriting Section 1305 to include the "requirements . . . imposed under state law" standard of the statute at issue in *Cipollone* is policy-driven, not textual, as the United States all but concedes. U.S. Br. at 17 (Section 1305 "could perhaps be read to preempt

even state-court enforcement of private contracts"). However, it is improper to rewrite clear statutory text even if the statute's overall "purpose" might arguably be better served by disregarding the statute's ordinary meaning. *Interstate Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439 (1994); *Greyhound Corp., v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). And here, preempting only "normative" contract claims would *not* better serve the ADA's purposes. To the contrary, the policy argument the United States advances here is indistinguishable from the argument that Section 1305 should be construed to preempt only affirmative state regulation or its equivalent, and that argument was emphatically rejected in *Morales*. 112 S. Ct. at 2037-38.

B. The Restrictive Reading Urged by the United States Frustrates the ADA's Objectives, Is Unworkable, and Is Unnecessary Because DOT Has Ample Authority to Enforce Preempted Contract Claims.

Lacking support in the statutory text or legislative history, the United States argues that its suggested revision of Section 1305 would be more "consistent with the ADA's deregulatory purpose." U.S. Br. at 9. The argument begins with the proposition that a deregulated market "could not operate absent a mechanism by which parties may be held accountable for their contracts." *Id.* at 23. This argument rests on the incorrect assumption that unless the government's restrictive reading is adopted, Section 1305 would broadly preempt all "garden variety" contract claims. That assumption is incorrect because Section 1305 would preempt only those contract claims whose enforcement is likely to impact competitive decision-making regarding rates, routes or services. *See* pages 7-8, *supra*. Moreover, it does not follow that preemption of *state* enforcement mechanisms would leave consumers unprotected. It is equally true that a deregulated market could not operate if airlines could engage in consumer fraud and unfair business practices with impunity. But *Morales* held, and the United States agrees,

that state enforcement of those laws is preempted when their application relates to rates, routes or services. Preemption of those state laws does not leave consumers unprotected because the federal remedy provided by Congress—though not equivalent to preempted state remedies—provides meaningful protection. The same is true here.

Although Congress did not itself prescribe detailed federal remedies for those contract claims that would interfere with competitive decision-making, it gave DOT ample authority to do so.[15] DOT can enforce Section 411 against unfair trade practices, including breach of contract.[16] DOT can even abate civil penalties under Section 411 upon payment of appropriate compensation to consumers, and has done so for many years. *See* Amer. Br. at 30 (citing decisions). Indeed, the *very conduct* respondents have challenged here was challenged under Section 411. *See id.* at 33-34. DOT entertained those challenges, but denied them on the merits. If American or other airlines were breaching promises respecting the availability of frequent flyer seats, DOT could have issued a cease and desist order preventing that conduct, thereby affording the plaintiff class in this case complete relief. DOT has done exactly that in response to complaints that a particular airline was imposing undisclosed capacity controls on discount fare availability. *See id.* at 31 (citing decisions).[17] Thus, there is no doubt that the very

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[15] Of course, the federal remedies need not be a mirror image of the displaced state remedies. The federal remedies under ERISA, for example, are much less extensive than the state laws they displaced. The federal remedies *prescribed* by ERISA are more detailed than the federal remedies prescribed by the ADA because the enforceability of benefit plans was the principal focus of ERISA, whereas enforcement of contracts between airlines and passengers was not the principal focus of the ADA.

[16] Although individuals do not have a right of action under Section 411, they can petition DOT to institute enforcement action. 14 C.F.R. § 302.201.

[17] "DOT conducts an active enforcement and consumer protection program." U.S. Br. at 3. In 1993, "DOT issued 34 cease and desist orders and assessed more than $1.8 million in civil penalties." *Id.*, n.2.

conduct challenged in this case could be adequately addressed by DOT.

More generally, DOT has broad authority to issue appropriate regulations. 49 U.S.C. App. § 1354(a). DOT can promulgate effective alternatives to traditional state law contract remedies, as it has done for overbooking—which is, after all, an alleged breach of a contractual obligation. Those regulations provide a uniform, federally prescribed remedy for such breaches. The "vast majority" of the more than 50,000 persons denied boarding in 1993 "accepted the denied-boarding compensation provided under DOT's rule." U.S. Br. at 24. This remedial scheme is plainly sufficient to ensure that airlines will not breach contracts with impunity.[18]

DOT could also use the additional authority conferred by 49 U.S.C. App. § 1371(q)(2), whose text expressly provides that the remedies for breach of contract authorized by that provision are to be "prescribed by" DOT, not by state courts, a point respondents and the United States ignore. *See* Amer. Br. at 30-31.

Thus, preempting *state* enforcement of claims like those at issue here would not mean airlines could breach contracts with impunity, and would not impede ADA's objectives. To the contrary, preemption would *promote* ADA's objectives. As the United States admits, the ADA's purposes are substantially broader than mere deregulation. "The ADA was intended to create conditions for an economically stronger and more competitive domestic airline industry." U.S. Br. at 2. Section 1305 was therefore de-

[18] The regulation also permits consumers to sue in an unspecified "court of law," 14 C.F.R. § 250.9(b), but almost no consumers do. Thus, this option is clearly not necessary to ensure that the federal remedy functions as an effective substitute for traditional state remedies. Nor is it persuasive to argue, as the United States has, that frequent flyer contract claims should not be preempted (unless they turn on state policies) because DOT "thus far has chosen not to adopt regulations governing frequent flyer programs." U.S. Br. at 4. DOT is free to do so if the need arises. *See generally Northwest Airlines, Inc. v. County of Kent*, 114 S. Ct. 855, 863-865 (1993). Such regulations could prescribe standards, as well as remedies.

signed to prevent states from "impairing the federal deregulatory scheme" *or* undermining "the ADA's goal of fostering competition," and also to "ensure uniformity of the remaining regulation of the airline industry." *See id.* at 1.

Preemption of respondents' claims directly advances these policy objectives. Respondents assert "a contractual right to receive . . . the benefits to which said mileage credits were entitled under the Program in effect *when the mileage credits were earned*." Pet. App. 51a-52a (emphasis added). Under the logic of that claim, American could not change any route, schedule or equipment that was available to respondents before the change. If in 1983 respondents had accumulated enough mileage credits to purchase any of the 200 seats then available on American's flight from X to Y, American could not in May of 1988 substitute a 100 seat plane, or reduce the number of flights, because that would arguably "devalue" respondents' previously accumulated mileage credits by making fewer seats available. But enforcing such a claim would directly frustrate a specific congressional policy, because Congress clearly wanted airlines to be free to change schedules and equipment in response to changing business conditions.[19] More broadly, if "any law" excluded enforcement of private contractual obligations, plaintiffs could obtain injunctive relief (specific performance) prohibiting such schedule or equipment changes. Even respondents acknowledge that such relief would be inconsistent with ADA's objectives and would be preempted. Resp. Br. at 33; *see* Resp. Brief in Opposition in No. 92-249, at 9.

Given the inherently interstate nature of air transportation services, uniformity is itself an important goal. Allowing states to exercise "their common law powers . . . is fundamentally at odds with the goal of uniformity."

[19] Congress expressly provided that not even the DOT can "restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities . . . as the development of the business and the demands of the public shall require." 49 U.S.C. App. § 1371(e)(4).

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990). That is particularly true under the ADA, because in developing a body of uniform federal law, DOT is—but states are not—under a "statutory mandate," U.S. Br. at 2, to ensure that the law advances ADA's other policy objective of placing "maximum reliance on competitive market forces and on actual and potential competition," rather than on governmental intervention. 49 U.S.C. App. §§ 1302(a)(4) and (a)(9).[20] It thus makes perfect sense for Congress to have preempted *state* mechanisms, vesting responsibility for achieving those policy objectives at the federal level.[21]

Furthermore, common law contract claims cannot neatly or easily be categorized as purely normative or non-normative. Such formalistic distinctions rarely exist in the real world.[22] The government's test would thus impose on judges the wholly unmanageable task (particularly at the pleading stage) of determining the "extent to which" contract claims "turn on" such state policies, versus the extent to which they turn on private obligations—as is demonstrated by the United States' inability to determine how respondents' claims should be characterized.

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[20] *See* U.S. Br. at 15 ("the purpose of the ADA is to leave largely to the airlines themselves, not to federal and state agencies and courts, the power to decide what marketing mechanisms are appropriate").

[21] DOT would also have to consider, but state courts would not, the effect claims such as those at issue here would have on the airline industry, which is facing an "unprecedented economic crisis." *See* ATA Amicus Br. at 6, 16.

[22] *See generally* Morris Cohen, *The Basis of Contract*, 46 Harv. L. Rev. 553, 562 (1933) ("When . . . and how [to enforce a contract] are important questions of public policy . . . the notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves"). Many positive enactments, like the Consumer Fraud Act, are codifications of traditional common law contract principles. *See* 2 E. Allen Farnsworth, *Farnsworth on Contracts* § 5.5, at 53-59 (1990). Conversely, the common law of contract itself incorporates a host of state normative policies drawn from statutory sources. *Id.*

Nor does a distinction between normative and non-normative contract claims make functional sense. Both would have the same "connection with or reference to" American's rates and services and would seek the same relief, which would have the same direct effect on those rates and services. Recognizing this problem, the United States acknowledges that Section 1305 may preempt even non-normative claims if (as here) the "relief would . . . directly affect rates and services." U.S. Br. at 29.

III. STATE ENFORCEMENT OF RESPONDENTS' CONTRACT CLAIMS IS PREEMPTED EVEN UNDER THE UNITED STATES' TEST.

The United States agrees that contract claims are preempted "if state laws, standards, or policies are invoked . . . to invalidate or limit contract terms . . . or to impose a 'construction' on those terms that departs from the parties' agreement." U.S. Br. at 17. The United States' inability to determine whether respondents' claims are preempted under its own test stems from its failure to recognize the significance of two facts: American *expressly reserved* the right to change the terms of the AAdvantage contract at any time, and AAdvantage contracts are *unilateral* contracts.

First, the state court could not even reach the merits of respondents' claim, much less grant relief, unless it first "invalidate[s] or limit[s]" the express reservation clause contained in the contracts at issue. U.S. Br. at 17. Respondents admit that, as part of the contract, American "reserved the right to restrict, suspend, or otherwise alter aspects of the Program." Pet. App. 64a. Although respondents now argue that American only reserved the right to make "prospective" changes, Resp. Br. at 10, the reservation clause does not by its terms limit the right to make changes to "prospective" changes. It plainly states that "AAdvantage program rules, regulations, travel awards and special offers are subject to change without notice," and provides that American "reserves the right to terminate the AAdvantage program at any time." *See*

U.S. Br. at 6 n.4. Thus, for respondents to have any chance to prevail, that clause must be invalidated or limited by operation of Illinois law. "In Illinois [the] 'covenant of fair dealing and good faith . . . implied into every contract' . . . 'imposes a limitation on the exercise of discretion vested in one of the parties to a contract.'" *Bonfield v. AAMCO Transmissions, Inc.*, 708 F. Supp. 867, 884 (N.D. Ill. 1989) (citations omitted). This means that "even if [as here] the express terms of the Agreement permitted [one party, in its "discretion"] to alter its policies, it could not change them arbitrarily," and would have to act "reasonably." *Id.* at 884-885.

American has compelling arguments why its May 1988 announcement was entirely fair and reasonable. The point, however, is that American's express reservation clause will bar respondents' contract claims unless that announcement is found under state normative doctrines to be unfair or unreasonable.

Second, respondents do not allege that American *expressly* promised to make available any seat on any flight, and the program brochure they filed below contains no such express promise.[23] Thus, the state court will have to fashion contractual promises and obligations out of the many "unilateral" statements American allegedly made in "general mailings" and "promotional materials" in "diverse national media". Pet. App. 49a, 51a. This is a classic unilateral contract, the existence and material terms of which depend on state policies and constructions that are independent of the actual, subjective intent of the parties. *See Corbin on Contracts* § 63, at 264 & n.43 ("The law enforces many an obligation in the contract field that the parties themselves never clearly expressed or contemplated."). For policy reasons, Illinois has ruled that a unilateral offer cannot be withdrawn or changed once the offeree has rendered part performance.[24] However, part

[23] That brochure has been lodged with the Clerk.

[24] *Weather-Gard Industries, Inc. v. Fairfield Sav. & Loan Ass'n*, 248 N.E.2d 794, 798 (Ill. Dist. 1969) (citing Restatement of Contracts).

performance must begin within a "reasonable time."[25] And if, as here, no time for completing performance is specified, "the law will supply a reasonable time."[26] Thus, whether contractual obligations even exist will depend on state policies.

For these reasons, *respondents'* claims inescapably depend on state policies, and are therefore prempted even if "any law" preempts only normative claims.

[25] *Calo, Inc. v. AMF Pinspotters, Inc.*, 176 N.E.2d 1, 5 (Ill. 1st Dist. 1961).

[26] *Hanson v. Duffy*, 435 N.E.2d 1373, 1377 (Ill. 2d Dist. 1982); *Murphy v. Roppolo-Prendergast Builders, Inc.*, 453 N.E.2d 846, 848 (Ill. 1st Dist. 1983) ("reasonable time" for completing performance "will be implied").

CONCLUSION

The decision and judgment of the Illinois Supreme Court refusing to preempt respondents' damage claims should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

I. PL 103-272, 108 Stat. 745, was signed into law on July 5, 1994, after petitioner's brief was filed. Section 1.(a) of that law describes the purpose of the law: "Certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted by subsections (c)-(e) of this section *without substantive change* as subtitles II, III, and V-X of title 49, United States Code. 'Transportation.' Those laws may be cited as '49 U.S.C. ——.'" (emphasis added).[1]

For the convenience of the Court we will reprint here the old and the current versions of the principal provisions relevant to this proceeding.

OLD: 49 U.S.C. App. § 1305 (a)(1) (Supp. I 1994), "Federal Preemption," provided:

> Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

NEW: 49 U.S.C. § 41713(b)(1), "Preemption of authority over prices, routes, and services," now provides:

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[1] S. Rep. 103-265, 103rd Cong. 2d Sess., May 19, 1994, also states that "[a]s in other codification bills enacting titles of the United States Code into positive law, this bill makes no substantive change in the law. . . . the law is intended to remain substantively unchanged." *Id.* at 5. The Senate Report explains that "[t]o restate the laws related to transportation in one comprehensive title, it is necessary to make changes in language. Some of the changes are necessary to attain uniformity within the title. Others are necessary as the result of consolidating related provisions of law and to conform to common contemporary usage. In making changes in the language, precautions have been taken against making substantive changes in the law." *Id.* at 3.

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.[2]

OLD: 49 U.S.C. § 1506 (Supp. I 1994), "Remedies not exclusive," provided:

Nothing contained in this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies.

NEW: 49 U.S.C. § 40120(c), "Relationship to other laws," now provides:

Additional Remedies.—A remedy under this part is in addition to any other remedies provided by law.

OLD: 49 U.S.C. App. § 1381(a) (Supp. I 1994), "Methods of competition; incorporation by reference," provided:

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

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[2] "Price" is defined in new 49 U.S.C. § 40102(a)(35) as "a rate, fare, or charge for air transportation."

NEW: 49 U.S.C. § 41712, "Unfair and deceptive practices and unfair methods of competition," now provides:

On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.

OLD: 49 U.S.C. App. § 1371(q)(2) (Supp. I 1994), "Insurance and liability," provided:

In order to protect travelers and shippers by aircraft operated by certificated air carriers, the Board may require any such air carrier to file a performance bond or equivalent security arrangement, in such amount and upon such terms as the Board shall prescribe, to be conditioned upon such air carrier's making appropriate compensation to such travelers and shippers, as prescribed by the Board, for failure on the part of such carrier to perform air transportation services in accordance with agreements therefor.

NEW: Section 41112(b), "Liability insurance and financial responsibility", now provides:

Financial Responsibility.—To protect passengers and shippers using an aircraft operated by an air carrier issued a certificate under section 41102 of this title, the Secretary may require the carrier to file a performance bond or equivalent security in the amount and on terms the Secretary prescribes. The bond or security must be sufficient to ensure the carrier

adequately will pay the passengers and shippers when the transportation the carrier agrees to provide is not provided. The Secretary shall prescribe the amounts to be paid under this subsection.

II. The Federal Aviation Administration Authorization Act of 1994, H.R. 2739, was passed by both the House and Senate on August 8, 1994, after petitioner's brief was filed. *See* 140 Cong. Rec. H7116-23 (daily ed. Aug. 8, 1994); *id.* at S10951-55. As of August 18, 1994, the Act had not yet been signed by the President. Section 601(b)(1) of the Act adds a new paragraph to Section 41713(b), the codified version of Section 1305. The new paragraph provides as follows:

49 U.S.C. § 41713(b)(4):

"(4) TRANSPORTATION BY AIR CARRIER OR CARRIER AFFILIATED WITH A DIRECT AIR CARRIER.—

"(A) GENERAL RULE.—Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

"B) MATTERS NOT COVERED.—Subparagraph (A)—

"(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to mini-

mum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

"(ii) does not apply to the transportation of household goods, as defined in section 10102 of this title.

"(C) APPLICABILITY OF PARAGRAPH (1).—This paragraph shall not limit the applicability of paragraph (1).".

No. 93-1286

In the Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN AIRLINES, INC., PETITIONER

v.

MYRON WOLENS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

The United States will address the following question:

Whether respondents' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act and for breach of contract under state common law, arising out of petitioner's changes to its frequent flyer program in 1988, are preempted by the Airline Deregulation Act of 1978, 49 U.S.C. App. 1305(a)(1).

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INTEREST OF THE UNITED STATES

Under the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. App. 1301 *et seq.*, the Department of Transportation (DOT) has broad authority to regulate certain aspects of the airline industry, including the authority to prevent, and to enter cease and desist orders barring, unfair and deceptive practices and unfair methods of competition. See 49 U.S.C. App. 1381(a). Congress mandated preemption of certain state laws under 49 U.S.C. App. 1305(a)(1) in order to prevent the States from impairing the federal deregulatory scheme and the ADA's goal of fostering competition, and to ensure uniformity of the remaining regulation of the airline industry. DOT has an interest in a sound application of Section 1305(a)(1) that protects both

the deregulatory, pro-competitive purposes of the ADA and the enforceability of private contracts, which are a key component of the deregulated, market-oriented airline system Congress sought to promote. DOT, like the Civil Aeronautics Board before it, has consistently recognized and relied upon the availability of state-court adjudication of contract claims in fulfilling the purposes of the ADA.

STATEMENT

1. Prior to 1978, the Federal Aviation Act of 1958 (FAA) gave the Civil Aeronautics Board (CAB) broad authority to regulate the interstate airline industry. Pub. L. No. 85-726, 72 Stat. 731. In 1978, however, Congress enacted the Airline Deregulation Act (ADA) to deregulate domestic air transport. Pub. L. No. 95-504, 92 Stat. 1705, codified at 49 U.S.C. App. 1301 *et seq.* The ADA was intended to create conditions for an economically stronger and more competitive domestic airline industry and to provide lower airfares and improved services to the traveling public. See *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992). In furtherance of that goal, the ADA contains a preemption clause, 49 U.S.C. App. 1305(a)(1), which provides in relevant part:

> [N]o State * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier.

The statutory mandate of the Department of Transportation, as the successor to the CAB,[1] includes "[t]he encouragement, development, and maintenance of an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices, and to determine the variety, quality, and price of

[1] The CAB's functions were phased out following 1978 until the CAB was abolished in 1985, and its authority was transferred to DOT. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3, 98 Stat. 1706; 49 U.S.C. App. 1551.

air transportation services." 49 U.S.C. App. 1302(a)(9); see 49 U.S.C. App. 1302(a)(4) and (10). DOT retains the authority, however, to investigate unfair and deceptive practices or unfair methods of competition by an airline and to order the airline to cease and desist from such practices or methods of competition. 49 U.S.C. App. 1381(a); see *Morales*, 112 S. Ct. at 2040; *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 296-297, 300-303 (1976). Under that authority, DOT conducts an active enforcement and consumer protection program relating to the airline industry.[2] While DOT's enforcement actions thus afford consumers an important measure of protection, DOT does not have a comprehensive administrative apparatus for adjudicating all individual disputes arising under contracts between airlines and their passengers. Rather, DOT regulations explicitly and implicitly rely as well on informal measures and the availability of state courts for the resolution of such contract disputes. See pages 19, 25-27, *infra*.

2. a. Frequent flyer programs are airline promotional devices that were initiated in the immediate post-deregulation period—first by American Airlines in 1981, and thereafter by almost every other major airline. The programs operate by allowing a passenger to enroll as a member, earn flight mileage credits based on miles flown, and redeem those credits for free flights, class-of-service upgrades, or other benefits.[3]

Frequent flyer programs have become "one of the most effective marketing practices yet devised for differentiating airline services and appealing directly to the

[2] For example, in 1993 alone, DOT issued 34 cease and desist orders and assessed more than $1.8 million in civil penalties in aviation economic enforcement proceedings.

[3] See generally Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices: Travel Agencies, Frequent-Flyer Programs, and Computer Reservation Systems* 32-35 (Feb. 1990) [hereinafter *Airline Marketing Practices*] (describing how frequent flyer programs operate).

traveller." *Airline Marketing Practices* at 31. They are targeted primarily toward airlines' most lucrative customers: full-fare business travelers who accumulate mileage on their paid business travel and use their mileage credits to obtain free vacation tickets they might not otherwise buy. The cost of the programs is minimized by funneling free trips to what would otherwise be excess capacity on scheduled flights. *Id.* at 31, 32, 39.

In order to minimize the cost of frequent flyer programs, however, "it is essential that there be minimum substitution between frequent flyer awards and airline services that would have been purchased in any case." *Airline Marketing Practices* at 32. Airlines therefore typically restrict the transferability of travel awards and place capacity controls on when they can be used. *Ibid.* As long as travelers using frequent flyer awards are not displacing full-fare business travelers—whether by taking up seats that could otherwise be sold, or by giving business travelers free tickets they would otherwise pay for—"many airline managers believe that their frequent flyer programs are essentially costless." *Id.* at 41.

b. As explained above, DOT's statutory mandate includes prevention of unfair and deceptive practices, and DOT is empowered to take administrative action against such practices. See 49 U.S.C. App. 1302(a)(7), 1381(a). That authority encompasses the power to regulate the type of misrepresentation alleged in respondents' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), Ill. Comp. Stat. Ann. ch. 815, §§ 505/1 *et seq.* (Smith-Hurd 1993). Although DOT has relied on its authority under Section 1381(a) to prevent unfair and deceptive practices involving such programs on an informal basis, it thus far has chosen not to adopt regulations governing frequent flyer programs. A petition filed by the Association of Discount Travel Brokers in 1991 proposed that DOT adopt a rule to eliminate sales and transfer restrictions on frequent flyer awards, eliminate excessively restrictive capacity controls, eliminate

unreasonable blackout dates, and require specified advance notice to consumers of program changes. Five airlines, including American, opposed that petition. DOT denied the petition. See DOT Order Dismissing Complaint and Denying Petition for Rulemaking (May 29, 1992) [hereinafter DOT Order Denying Rulemaking] (Pet. App. 85a, 90a). DOT found that the requested rules were unwarranted because the brokers' association had failed to show "that the carriers' conduct misleads or is likely to mislead program members," *id.* at 97a, "that members are unaware that carriers reserve the right to change the terms of the programs or impose blackout dates or capacity limits," *ibid.*, or that carrier practices either amount to unfair methods of competition, *id.* at 98a, or "cause unwarranted consumer injury," *id.* at 100a.

3. a. In each of these two consolidated cases, respondents filed a class action against American Airlines in the Circuit Court for Cook County, Illinois. Pet. App. 48a-60a, 61a-73a. Respondents allege that they were members of American's frequent flyer program (AAdvantage) prior to May 18, 1988, *id.* at 49a, or at least prior to June 1, 1988, *id.* at 63a. They allege that, in order to accumulate mileage in the AAdvantage program, they used the services of American, even if more costly or less convenient than those of other airlines, and of hotels, car rental companies, and other companies participating in the program. *Id.* at 49a, 62a-63a. According to the complaints, on May 18 and June 1, 1988, American altered its program to the detriment of members who had accumulated mileage credits. *Id.* at 50a, 52a, 63a, 65a-66a. The challenged practices included:

- Additional blackout dates, during which awards may not be used for travel (*id.* at 52a, 65a)

- Capacity controls, *e.g.*, placing a 50 percent maximum on the number of available seats allocated to persons using free travel awards (*id.* at 50a, 52a, 56a, 65a, 66a)

- Changes in mileage credits required for first-class upgrades, and capacity controls on first-class upgrades (*id.* at 65a)

- Changes in the award structure such that, *e.g.*, tickets previously available for 50,000 mileage credits would be available for 60,000 credits for a restricted-use ticket, or 120,000 credits for a ticket valid at peak times and days (*id.* at 65a-66a)

- Reductions in the mileage credits earned per flight (*id.* at 52a, 66a)

Respondents allege that American's alteration of its program violated the Illinois Consumer Fraud Act and constituted a breach of contract. In their Consumer Fraud Act claims, respondents assert that American knowingly made false representations in its materials soliciting respondents to join AAdvantage, including by offering "Triple Mileage" credits at a time when American knew it was about to institute capacity controls. Pet. App. 56a, 70a. Although respondents acknowledge that American "reserved the right to restrict, suspend, or otherwise alter aspects of the Program," *id.* at 64a,[4] they claim that American fraudulently failed to notify them that it reserved the right to do so "retroactively" by altering or reducing the benefits available in exchange for mileage credits already earned, *id.* at 56a-57a, 70a.

Respondents' contract claims rest on allegations that American, through the AAdvantage program, made unilateral offers of specified benefits to respondents to

[4] The brochure explaining the AAdvantage program stated: "AAdvantage program rules, regulations, travel awards and special offers are subject to change without notice. American Airlines reserves the right to terminate the AAdvantage program at any time." American Airlines AAdvantage Program Brochure (4/87), *reproduced at* Supplemental Appendix to Brief of Plaintiffs-Appellees at SA8, *Wolens* v. *American Airlines, Inc.*, No. 89-918 (Ill. App. Ct. Dec. 12, 1990).

induce them to fly American and patronize other businesses affiliated with AAdvantage, and that each respondent "accepted by joining the Program, traveling on [American's] airline and/or using the facilities and services of other participants in the Program." Pet. App. 51a; see *id.* at 63a. When American reduced the value of the benefits earned through such acceptance, respondents allege, it breached their contracts. *Id.* at 52a, 63a, 66a.

Respondents sued on behalf of themselves and a class alleged to consist of millions of persons. Pet. App. 50a, 63a. They sought damages in the amount by which the value of the mileage credits they had earned was reduced by reason of the allegedly unlawful acts of American, plus punitive damages. Respondents also sought an injunction against application of any changes in the AAdvantage program in a manner that would affect mileage credits previously earned. *Id.* at 53a-55a, 57a-58a, 59a, 67a, 68a, 71a, 72a.

b. The trial court consolidated the cases, and American moved to dismiss, contending that the claims were preempted by Section 1305(a)(1). The court denied the motion to dismiss. Pet. App. 41a-45a. On interlocutory appeal, the Illinois Appellate Court held that Section 1305(a)(1) preempts the request for injunctive relief, but not the claim for damages for breach of contract and violation of the Illinois Consumer Fraud Act. Pet. App. 31a-40a. The Supreme Court of Illinois affirmed. *Id.* at 20a-30a.

c. While American's petition for a writ of certiorari was pending, this Court rendered its decision in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). *Morales* broadly interpreted the term "relating to" in the preemption clause of the ADA to apply to a State's enforcement of its consumer fraud laws "having a connection with" or making a "reference to" airline rates, routes, or services. 112 S. Ct. at 2037.

d. In light of *Morales*, this Court vacated the judgment of the Supreme Court of Illinois in this case, and remanded for further consideration. *American Airlines, Inc.* v. *Wolens*, 113 S. Ct. 32 (1992) (Pet. App. 19a). On re-

consideration, the Supreme Court of Illinois reinstated its prior judgment. Pet. App. 1a-16a. The damage claims at issue, the court held, do not "relate to the rates, routes, or services" of an airline because a frequent flyer program is not an "essential element" of airline operations. *Id.* at 6a. The court held that respondents' claims for money damages do not seek to establish the rates airlines must charge, the routes they must fly, nor the services they must provide. *Ibid.* Rather, their claims "bear[] only a tangential relation to airline rates, routes, and services," because "frequent flyer programs are peripheral to the operation of an airline." *Id.* at 6a-7a.

SUMMARY OF ARGUMENT

I. Respondents' Illinois Consumer Fraud Act claims are expressly preempted by 49 U.S.C. App. 1305(a)(1). The Court in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), read the phrase "relating to" in Section 1305(a)(1) broadly to encompass all laws having any direct or indirect "connection with" or "reference to" airline rates, routes, or services. Respondents' claims relate to rates and services as closely as did the claims preempted in *Morales*. First, the claims refer to "rates" American charges (in the form of mileage credits) for free tickets and upgrades, and they demand "services" in the form of access to flights and class-of-service upgrades without regard to capacity controls and blackout dates. Second, the claims relate to rates and services "as an economic matter." *Morales*, 112 S. Ct. at 2039. Imposition of advance notice requirements under the Illinois Consumer Fraud Act could limit American's ability to maximize its profits through sales of full-fare tickets while still offering valuable frequent flyer benefits to consumers. See *id.* at 2039-2040. The Supreme Court of Illinois erred in holding that respondents' damage claims are not preempted on the ground that frequent flyer programs are not "essential" to airline operations; even claims relating

to non-essential operations are preempted under *Morales* if they relate to rates, routes, or services.

II. Respondents' common-law contract claims are subject to a different analysis, because contract obligations arise from private parties' agreement to their own chosen terms, and thus do not amount to a State's "enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law" within the meaning of Section 1305(a)(1). Section 1305(a)(1) is intended to bar a State from adopting or implementing measures to enforce the public policy of the State affecting rates, routes, or services, not to bar a State from effectuating terms in a private contract voluntarily entered into by an airline and its customers.

References to "contract" and "agreements" in other sections of the FAA (as amended by the ADA) demonstrate that Congress recognized that the airline business would be governed in large part by private contract, and therefore undermine the notion that Congress intended to preempt all claims for breach of such contracts. The legislative history contains no indication that such claims are preempted, and DOT regulations and policy statements expressly contemplate that the thousands of minor disputes arising each year under passengers' contracts with airlines may be adjudicated under state law.

Effectuating private contracts also is consistent with the ADA's deregulatory purpose, because contracts do not substitute state policy decisions for airlines' business judgments, but are rather a key component of the deregulated market that the ADA was designed to encourage. Accordingly, state courts are not barred by Section 1305(a)(1) from adjudicating breach of contract claims—including those arising under a contract concerning frequent flyer benefits—to the extent the courts merely give effect to agreements between private parties and afford remedies for their breach. A State may not, however, impose its public policy on airline operations through the application of those aspects of its common law

of contracts (*e.g.*, the doctrine of unconscionability) that go beyond ascertaining and enforcing the private agreement between the parties. Respondents' contract claims should be remanded to the Supreme Court of Illinois for further proceedings under these principles.

ARGUMENT

I. SECTION 1305(a)(1) OF THE AIRLINE DEREGULATION ACT OF 1978 PREEMPTS RESPONDENTS' CLAIMS UNDER THE ILLINOIS CONSUMER FRAUD ACT

The Airline Deregulation Act of 1978 (ADA), in 49 U.S.C. 1305(a)(1), expressly preempts respondents' claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act), Ill. Comp. Stat. Ann. ch. 815, §§ 505/1 *et seq.* (Smith-Hurd 1993). Those claims "relat[e] to rates, routes, or services" within the meaning of Section 1305(a)(1), as interpreted by this Court in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992). The state statutory claims in this case challenge the adequacy of the prior notice American Airlines provided to consumers regarding changes the airline made in 1988 to its AAdvantage frequent flyer program. Like the claim in *Morales* challenging the adequacy of information provided in airfare advertising, respondents' consumer fraud claims have the prohibited "connection with" or "reference to" rates and services, and are therefore preempted.

A. This Court held in *Morales* that Section 1305(a)(1) of the ADA bars state enforcement actions challenging airline fare advertising under a state consumer fraud statute and a set of multi-state Travel Industry Enforcement Guidelines issued by the National Association of Attorneys General (NAAG). 112 S. Ct. at 2041. Trans World Airlines sought to enjoin the state of Texas from enforcing the NAAG guidelines through the Texas Deceptive Trade Practices-Consumer Protection Act

(Deceptive Trade Act), Tex. Bus. & Com. Code Ann. §§ 17.41 *et seq.* (Vernon 1987). See 112 S. Ct. at 2035. The guidelines required, among other things, that advertisements for fares make conspicuous disclosures of applicable restrictions, and that any advertised fare be available in sufficient quantity to meet reasonably foreseeable demand on all flights at all times. See *id.* at 2039.

The Court focused on the language in Section 1305(a)(1) that refers to state laws "relating to rates, routes, or services." The Court held that the term "relating to" in Section 1305(a)(1) should be read as broadly as the phrase "relate to" under the Employee Retirement Income Security Act of 1974 (ERISA), which expressly supersedes all laws "insofar as they * * * relate to any employee benefit plan." 29 U.S.C. 1144(a). See 112 S. Ct. at 2037. Guided by cases interpreting "relate to" under ERISA, the Court held that Section 1305(a)(1) preempts state enforcement of any action "having a connection with or reference to" rates, routes, or services. 112 S. Ct. at 2037. The Court noted that Section 1305(a)(1) is not limited to state laws "actually prescribing" rates, routes, or services, nor to laws addressed to the airline industry in particular, *id.* at 2037-2038, and that it preempts state laws without regard to whether their substantive requirements are consistent or inconsistent with those of the ADA, *id.* at 2038.

Applying these principles, the *Morales* Court found that the NAAG guidelines "relate[d] to" rates within the meaning of Section 1305(a)(1) in two ways. First, they "quite obviously" related to rates, because "[i]n its terms, every one of the guidelines * * * bears a 'reference to' air fares." 112 S. Ct. at 2039. Second, the guidelines related to rates "as an economic matter," because state restrictions on fare advertising "have the forbidden significant effect on fares." *Ibid.* The Court explained that "the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and

hence a significant impact upon the fares they charge." *Id.* at 2040.

The Court acknowledged that "'[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have a pre-emptive effect." 112 S. Ct. at 2040, quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). Thus, state laws against gambling or prostitution as applied to airlines would not be preempted, nor would laws relating to certain non-price aspects of fare advertising, such as obscene depictions. 112 S. Ct. at 2040.

Finally, the Court stressed that under the federal regime enacted by Congress, the airlines do not have "*carte blanche* to lie and deceive consumers." 112 S. Ct. at 2040. The Court explained that DOT retains the power, under 49 U.S.C. App. 1381(a), to prohibit "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." See 112 S. Ct. at 2040.

B. The same two rationales supporting preemption of the claims in *Morales* require preemption of respondents' claims based on the Illinois Consumer Fraud Act. First, the claims "quite obviously" relate to rates and services because, as pleaded by the respondents, they expressly "bear[] a 'reference to'" rates and services. 112 S. Ct. at 2039. Respondents' complaints allege that American changed the rates at which it awarded frequent flyer tickets, and they challenge changes to the terms on which passengers can "*pay* for flights with free travel awards." Pet. App. 52a (emphasis added). Although the currency is mileage credits and not dollars, the claims regarding required award levels directly attack the "rates" at which tickets are available.

The Consumer Fraud Act claims are also connected to "services." Respondents allege that American limited the availability of upgrades to first-class service, as well as service on certain blackout days and peak times. They assert a right to enjoy American's services on the terms on which they were available prior to May 18, 1988, when,

respondents allege, they were entitled to redeem frequent flyer miles for "free air travel on any available date to applicable destinations for any available seat in the class of *service* provided." Pet. App. 52a (emphasis added). The claims also expressly refer to "travel and other benefits" respondents seek, *id.* at 49a, 62a, and "travel" is the core service American provides.

Preemption of respondents' Illinois Consumer Fraud Act claims is also supported by the second rationale of *Morales*: the claims relate to rates and services "as an economic matter." 112 S. Ct. at 2039. The claims have a direct connection with the mechanisms through which American conducts its marketing.[5] They also affect American's management of its passenger capacity to provide maximum services at the lowest cost.[6] Because respondents' claims relate to the mix of full-fare and "free" seats American offers its customers, and because any requirement of advance notice of specific changes would directly affect its flexibility to adjust that mix, state restrictions on the form or substance of notice, like the state restrictions on advertising at issue in *Morales*, have "the forbidden significant effect" on rates and services. *Ibid.*[7]

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[5] Respondents acknowledge in their complaints that frequent flyer programs are "a marketing device." Pet. App. 48a-49a, 62a.

[6] See generally *Morales*, 112 S. Ct. at 2039 (describing airlines' management of their passenger capacity in relation to prices at which seats are sold); *Airline Marketing Practices* at 414-415; Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 Yale J. on Reg. 393, 414-415 (1987) [hereinafter *Airline Competition*].

[7] The close relationship between the conduct challenged under the Illinois Consumer Fraud Act and that addressed by the Texas statute and NAAG guidelines found to be preempted in *Morales* further supports the conclusion that respondents' statutory claims are preempted. Although it was the advertising portions of the guidelines that were at issue in *Morales*, the guidelines also contain detailed provisions relating to frequent flyer programs. See 112 S. Ct. at 2049-2054 (appendix reprinting guidelines). The guidelines instruct airlines regarding language that NAAG considers "non-deceptive" and

The Supreme Court of Illinois plainly erred in holding that respondents' damage claims are not preempted on the ground that a frequent flyer program is not "essential" to the operations of an airline. Pet. App. 6a. The test under *Morales* is not whether the practice at issue is "essential," but whether it "relates" to—*i.e.*, has a "connection with" or makes "reference to"—rates, routes, or services. 112 S. Ct. at 2037. Only state laws that affect the specified airline operations in a "tenuous, remote, or peripheral" manner may coexist with Section 1305(a)(1). *Id.* at 2040. The measure of what is too "tenuous" to be preempted is properly viewed as the other side of the "relating to" coin. The examples referred to in *Morales* of state laws that would have too tenuous or remote an effect on air fares to be preempted were gambling, prostitution, and obscenity laws. *Ibid.* Those examples do not suggest that state laws relating to any aspect of airline operations that may be regarded as less than "essential" are consistent with the ADA.

Moreover, the historical analysis the Supreme Court of Illinois employed in finding frequent flyer programs not to be "essential" to airline operations is especially misplaced in the context of the ADA. The court observed that "the airline industry functioned successfully for decades prior to providing incentives to its travelers in the form of frequent flyer programs." Pet. App. 6a. Although it is

"consistent with state law" for reservation of airlines' rights to alter their programs, 112 S. Ct. at 2049; similarly here, respondents claim that American, although it "reserved the right to restrict, suspend, or otherwise alter aspects of the Program," Pet. App. 64a, did not sufficiently inform them of the nature of changes American might make. The guidelines also provide detailed transition rules for the institution of capacity controls in a manner NAAG deems fair, 112 S. Ct. at 2050; respondents complain of the manner in which American instituted capacity controls. The Texas law that, in conjunction with the guidelines, created a potential cause of action by private customers in *Morales*—the Texas Deceptive Trade Act—is closely analogous to the statute upon which respondents in this case rely—the Illinois Consumer Fraud Act.

true that airlines did function prior to the institution of frequent flyer and other post-deregulation innovations, it was precisely the airlines' failure to function as successfully as Congress wished that prompted deregulation. In the era of deregulation, "[f]requent flyer programs have been widely acknowledged as the most successful marketing programs in airline industry history." *Morales*, 112 S. Ct. at 2049 (NAAG guidelines).[8] In any event, the purpose of the ADA is to leave largely to the airlines themselves, not to federal and state agencies and courts, the power to decide what marketing mechanisms are appropriate in the furnishing of air transport services.

C. For the foregoing reasons, the judgment of the Supreme Court of Illinois should be reversed insofar as it holds that respondents' claims for damages under the Illinois Consumer Fraud Act are not preempted by 49 U.S.C. App. 1305(a)(1).

II. SECTION 1305(a)(1) DOES NOT ALTOGETHER PREEMPT STATE-LAW CLAIMS FOR BREACH OF CONTRACT

Section 1305(a)(1) provides that no State "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law" relating to the rates, routes, or services of an air carrier. The focus of Section 1305(a)(1) is on preventing the States from enacting or enforcing normative policy choices touching on airlines' rate, route, or service offerings. Section 1305(a)(1) does not in terms refer to private contracts or suits for breach of a contract voluntarily entered into by a carrier. The preemption provision describes activities most naturally associated with the exercise of state power, not with the resolution of private contract disputes. It is thus best read not to displace (or to prevent the

[8] *See* Levine, *Airline Competition*, 4 Yale J. on Reg. at 414 (stating that "virtually every carrier of any size" has adopted a frequent flyer program, and that such programs "have assumed an unexpected importance in deregulated airline competition").

effectuation of) competitive, market-driven choices embodied in private contracts. To the extent that respondents' common-law claims for breach of contract are based on allegations of an agreement actually entered into by respondents and American, as distinguished from state laws or policies external to any agreement, Section 1305(a)(1) leaves those claims intact.

A. In a number of respects, the text of Section 1305(a)(1) indicates that it was not intended to bar state courts altogether from entertaining state common-law actions based on alleged breaches by airlines of their contracts with passengers. Section 1305(a)(1) provides that no State "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law" that relates to rates, routes, or services of an air carrier. The series of words—"law, rule, regulation, standard, or other provision"—connotes official, government-imposed policies, not the terms of a private contract agreed to by the parties. That understanding is reinforced by the phrase "having the force and effect of law," which generally refers to binding standards of conduct that operate irrespective of any private agreement. So, too, the import of the directive that no State may "enact or enforce" such a provision "relating to rates, routes, or services" is that States may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier.

The conclusion that the ADA was not intended to prevent state courts from entertaining breach-of-contract suits is reinforced by the savings clause in 49 U.S.C. App. 1506, which was enacted in 1958, see Pub. L. No. 85-726, § 1106, 72 Stat. 798, and was not repealed by the ADA. The savings clause expressly preserves "the remedies now existing at common law or by statute." When read in conjunction with the savings clause, Section 1305(a)(1) bars a State from adopting or enforcing its own substantive standards with respect to rates, routes, or services, but not from making available the customary

"remedies" to a party claiming that an airline has breached terms to which it voluntarily agreed by entering into a contract with a customer.[9]

To be sure, the States are without authority under Section 1305(a)(1) to "enforce" as well as to "enact" laws, rules, regulations, standards, and other provisions having the force and effect of law. That language could perhaps be read to preempt even state-court enforcement of private contracts. It is most consistent with the purposes of the ADA and the practical demands of deregulation, however, to read the ban on enforcement to refer only to imposition of the States' own legal standards, rather than effectuation of terms agreed to by private parties. The ADA's reference to "enforce[ment]" is readily susceptible of such a reading. Section 1305(a)(1) deprives the States of the authority to "enforce" as well as "enact" laws in order to make clear that future as well as existing laws are covered. The requirement that States not "enforce" laws with respect to specified subjects also reinforces the conclusion that even those state laws or provisions that do not themselves prescribe "rates, routes, or services" must not be enforced in such a manner as to affect them. *Cf. Morales*, 112 S. Ct. at 2037-2038. Thus, although we believe that state-law breach-of-contract claims are not altogether preempted, if state laws, standards, or policies are invoked in a breach-of-contract action to invalidate or limit contract terms agreed to by the parties, or to impose a "construction" on those terms that departs from the parties' agreement, such "enforce[ment]" would run afoul of Section 1305(a)(1) and *Morales*. See pages 29-30, *infra*.

[9] As the Court held in *Morales*, Section 1305(a)(1), where it applies, trumps the savings clause in 49 U.S.C. 1506; the savings clause therefore did not permit a state attorney general from enforcing standards, imposed by state law, against an air carrier. 112 S. Ct. at 2037. *Morales* does not, however, render the savings clause's preservation of "remedies" irrelevant to the question whether Section 1305(a)(1) should be construed to reach private contract claims in the first place.

Moreover, in contrast to the close parallel between the use of "relate to" in ERISA and "relating to" in Section 1305(a)(1) that the Court relied upon in *Morales*, the two statutes' preemption provisions differ with respect to the types of state law covered. ERISA, unlike the ADA, provides that it "shall supersede" all state law, and that the state law affected expressly includes "decisions." See 29 U.S.C. 1144(a) and (c)(1); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990).[10] Section 1305(a)(1), in contrast, does not "supersede" the entire corpus of state-law principles, but instead prohibits States from "enact[ing] or enforc[ing]" certain laws and other provisions having the force and effect of laws. And it does not in terms prohibit "orders" or "decisions" in which courts do nothing more than effectuate private parties' contract terms.[11]

B. Just as the Court must "give full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme," *California* v. *Federal Energy Regulatory Commission*, 495 U.S. 490, 497 (1990), it should consider the express references elsewhere in the FAA to contracts and agreements as evidence that Congress did not intend to preempt all contract claims. Section 1381(b), 49 U.S.C. App. 1381(b), shows that Congress presupposed the continued vitality of individual contracts—and therefore of at least certain claims alleging breach of such contracts. That Section

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[10] See also *CSX Transportation, Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1737 (1993) (quoting statutory reference to preempted state law that includes "orders"); cf. *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129-130 (1991) (laws giving effect to contracts preempted by provision making consolidating rail carriers "exempt" from "all" laws as necessary to accomplish consolidation).

[11] Compare Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. 1715z-17(d), 1715z-18(e) (expressly preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. 301(a) (preempting rights "under the common law or statute of any state").

refers to the "contract of carriage," which is the standard contract for an airline trip. Section 1381(b) authorizes air carriers to "incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage" to the extent authorized by DOT. DOT regulations similarly refer expressly to "contract[s]" in requiring carriers to give passengers notice of "[r]ights of the carrier to change terms of the contract." 14 C.F.R. 253.5(b)(3). They also specify that carriers must give passengers conspicuous written notice of "time periods within which passengers must file a claim or bring an action against the carrier for its acts or omissions or those of its agents." 14 C.F.R. 253.5(b)(2). The preamble to that regulation makes clear that DOT regarded passengers to be free to file state-law contract claims: DOT explained that although the regulation "takes a Federal approach to the structure of the contract notice that must be provided," DOT recognized that "[w]ith the end of domestic tariffs on January 1, 1983, the airlines would be subject to the *contract law of the States* in issuing ticket contracts." 47 Fed. Reg. 52,129, 52,130 (1982) (emphasis added). A holding that all private contract claims are preempted would eliminate the option for consumers to seek compensation under state law in appropriate circumstances.

Section 1371(q)(2), 49 U.S.C. App. 1371(q)(2), regarding "Insurance and liability," also implies a role under the ADA for judicial resolution of contract disputes. That Section authorizes DOT to demand that any carrier file "a performance bond or equivalent security arrangement." Such bonds are conditioned on the airlines' "making appropriate compensation" to travelers for failure "to perform air transportation services in accordance with agreements therefor." *Ibid.* The Act thus contemplates that the airlines' own "agreements" with passengers—*i.e.*, their contracts—will identify the services the airlines furnish, and therefore form the basis for calculating the

appropriate level of compensation for a breach of the duties the airlines assumed.[12]

C. In determining the precise scope of preemption, this Court typically refers to "the purposes of the pre-emption provision, and the regulatory focus of [the statute] as a whole." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 19 (1987). The central purpose of Section 1305(a)(1) is to prevent state economic regulation relating to rates, routes, or services. The reasons for preventing such regulation do not, however, extend to the contractual terms agreed upon by the parties themselves. No committee or conference report, floor statement, or bill at any time suggested that all claims to effectuate contract terms would be preempted under Section 1305(a)(1).[13] The state laws, rules and regulations cited disapprovingly in the legislative history were state enactments or applications of normative standards, including disallowances of rate increases, and other state fare regulation.[14]

[12] It is also unlikely that Section 1305(a)(1) preempts safety-related personal-injury claims relating to airline operations. See 49 U.S.C. App. 1371(q)(1) (requirements for a carrier to have insurance for amounts for which the carrier "may become liable" for personal injuries and property losses "resulting from the operation or maintenance of aircraft"); see, *e.g.*, *Hodges* v. *Delta Airlines, Inc.*, 4 F.3d 350 (5th Cir. 1993). As the Fifth Circuit explained in *Hodges*, "[i]f liability for personal injuries were preempted," DOT regulations requiring airlines to carry insurance covering such injuries "would hardly be necessary, because there is no federal compensation scheme for injuries to airline passengers." *Id.* at 355. The *Hodges* court held that the tort claim before it was preempted only because the panel was bound by a previous unpublished decision extending preemption to personal injury claims; the court has since agreed to review the case *en banc*. See 12 F.3d 426 (1994).

[13] See H.R. Conf. Rep. No. 1779, 95th Cong., 2d Sess. (1978); H.R. Rep. No. 1211, 95th Cong., 2d Sess. (1978); S. Rep. No. 631, 95th Cong., 2d Sess. (1978); see, *e.g.*, 124 Cong. Rec. 30,663 (1978) (remarks of Rep. Fascell); *id.* at 10,688 (remarks of Sen. Cranston).

[14] For example, the Senate Report referred to the preemption provision as an effort to "rationalize a confusing system of dual regulation of federally certificated air carriers that has evolved in some States." S. Rep. No. 631, *supra*, at 98. The Report explained that "recently several States have involved themselves in regulating the services of interstate airlines between points within their State. For example, the State of Pennsylvania has, in recent years, disallowed fare increases between Pittsburgh and Philadelphia which were authorized by the Civil Aeronautics Board. Additionally, the State of California regulates the interstate fares of CAB-certificated air carriers, even in markets where the CAB carrier has a monopoly and, therefore, should be subject to the CAB price policies." *Ibid.*

Private contract claims are of a different order. When the terms of a contract are purely voluntary and of the parties' own making, their enforcement will not result in the substitution of state law or policy for the airlines' business judgments about how the airlines should be run. "[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law.'" *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2622 (1992) (plurality opinion) (emphasis omitted). Where a State affords a common-law remedy for breach of such a commitment, "[t]he level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations." *Id.* at 2628 (Blackmun, J., joined by Kennedy & Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part). The common law of contract that state courts may apply consistent with Section 1305(a)(1) "does not define the terms of the relationship between [the parties]," *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51 (1987), but instead only declares that a breach of the agreed-upon terms may entitle the non-breaching party to a remedy. Hence, where contracts are concerned, if an airline's experience proves that particular terms are unprofitable or burdensome, the airline is free not to agree to such terms in the future.

D. The conclusion that the ADA does not entirely preempt state-law contract claims is further reinforced by the consequences of such a construction. Three equally untenable results are possible.

One possibility is that DOT would be solely responsible for adjudicating all complaints of breach of contract. The ADA did not, however, create any administrative apparatus for DOT adjudication of private contract disputes. Even assuming that DOT has the power to create such a mechanism, see, *e.g.*, 49 U.S.C. App. 1324(a) (granting DOT powers necessary to carry out the provisions of the FAA), to do so would be contrary to the ADA's basic deregulatory thrust. Prior to deregulation, rates, routes, and services had been set by the CAB through a cumbersome administrative process of applications and approvals. Pub. L. No. 85-726, 72 Stat. 731 (1958). Through deregulation, Congress sought not to create a new, extensive bureaucracy, but to place less reliance on regulatory decisions in favor of a market mechanism operating by way of private decisions.[15] It is, in our view, inconceivable that Congress intended routine breach-of-contract cases to be preempted in favor of a federal administrative regime to resolve all contract-based claims by customers against airlines.

A second possible, but equally untenable, result of preemption of all contract claims is wholesale elimination of the enforceability of contracts in any forum. Under such an interpretation, federal preemption would simply render null and void—or at least unenforceable—any contract touching on airline "rates, routes, or services," as those terms were broadly interpreted in *Morales*. Such

[15] H.R. Conf. Rep. No. 1779, *supra*, at 53 (describing purpose of the ADA "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services"); DOT Order Denying Rulemaking (Pet. App. 85a, 101a) (referring to "Congress' decision that the public will benefit if airline fares and services are determined by market forces rather than government regulation").

a principle would invalidate passengers' claims (such as those for "bumping," or lost or damaged baggage) that service was not provided as promised, and might by the same token eliminate airlines' own contract-based claims that a passenger failed to make payment, or illegally transferred a ticket. See, *e.g.*, *American Airlines* v. *Christensen*, 967 F.2d 410 (10th Cir. 1992). Such a result could not be squared with a statute designed to place maximum reliance on market forces, which ordinarily could not operate absent a mechanism by which parties may be held accountable for their contracts. The stability and efficiency of the market depend fundamentally on the enforceability of agreements freely made, based on needs perceived by the contracting parties at the time. The absence of any indication in the legislative history that Congress intended to eliminate all common-law contract remedies makes this alternative particularly implausible. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured," *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984), by breaches of contract.

A third possible outcome would be to shift contract claims relating to rates, routes, or services to the federal courts, to be resolved under a judicially fashioned federal common law. That result, which would redirect potentially countless minor contract disputes into federal court, is also unsupported by the ADA. There is no indication in the ADA's text, history or purpose that Congress believed that adjudication of such claims under state common law was anti-competitive or burdensomely non-uniform, and that the courts should instead fashion federal common law applicable to airline-related contract claims. Unlike ERISA, which created extensive federal civil claims procedures, see 29 U.S.C. 1132(a)(3) and (e),[16] the ADA

[16] See *Ingersoll-Rand*, 498 U.S. at 143-145 (finding ERISA's comprehensive and detailed civil enforcement mechanism to be a "special feature" supporting preemption of common-law wrongful discharge

does not establish such procedures or otherwise suggest that contract claims be adjudicated under federal law. The judiciary has hesitated to formulate a body of federal common law without clear expression of congressional intent to do so, particularly where disputes involve only private parties.[17]

The large numbers of contract claims potentially relating to "rates, routes, or services" makes it implausible that Congress would have preempted those claims without so much as mentioning them. For example, there were 50,840 cases of involuntarily denied boarding in 1993 alone. While the vast majority of those passengers accepted the denied-boarding compensation provided by DOT's rule, each passenger could have pursued a claim in state court in conformity with the same rule. Each year the airlines also receive several million complaints concerning lost, damaged or delayed baggage, most of which are resolved informally. However, certain kinds of contract claims relating to air travel are routinely adjudicated in state courts.[18] Elimination of state courts as a forum for

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claims); *Pilot Life*, 481 U.S. at 54 (referring to the "detailed," "comprehensive" and "carefully integrated" civil enforcement scheme providing for "prompt and fair claims settlement").

[17] See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 643-644 (1981) (finding no "unmistakably clear" expression of congressional intent to create a federal common-law right of contribution from co-conspirators with respect to treble-damages antitrust action). If Congress had identified non-uniformity of *contract* principles as a distinct barrier to airline competition, there might be greater reason for the courts to develop uniform federal common-law principles for contract enforcement. Cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989) (declaring that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans'" (quoting *Pilot Life*, 481 U.S. at 56)).

[18] See, *e.g.*, *Cantor* v. *Piedmont Aviation, Inc.*, 474 A.2d 839 (D.C. App. 1984) (applying contract liability limits to lost-luggage claim); *Wackenhut Corp.* v. *Lippert*, 609 So. 2d 1304 (Fla. 1992) (applying contract liability limits to claim for value of hand baggage lost at security checkpoint), cert. denied, 113 S. Ct. 2996 (1993); *Crites* v. *Delta Air Lines, Inc.*, 341 S.E.2d 264, 266 (Ga. Ct. App. 1986) (noting in

disposition of routine contract claims would be fundamentally at odds with the ADA.

E. The administrative implementation of the ADA by the CAB and DOT also reinforces the conclusion that common-law contract claims are not altogether preempted by Section 1305(a)(1). Federal regulations governing "bumping" of passengers from overbooked flights envision that passengers may sue in state court to recover damages for breach of their contracts of carriage.[19] The regulations provide that a passenger who is involuntarily bumped may accept compensation offered by the airline, or "may decline the payment and seek to recover damages in a court of law or in some other manner." 14 C.F.R. 250.9(b).[20]

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contract case that "Georgia has long recognized that a ticket holder has a right of action for the breach of a contract of carriage"); *Chow* v. *Trans World Airlines, Inc.*, 544 N.E.2d 548 (Ind. Ct. App. 1989) (granting promissory estoppel recovery based on airline's promises to arrange connecting flight); *Ravreby* v. *United Airlines, Inc.*, 293 N.W.2d 260, 266 (Iowa 1980) (holding that no contract duty to protect nonsmokers from smoke discomfort arises from airline's policy of segregating smoking and nonsmoking passengers); *Vick* v. *National Airlines, Inc.*, 409 So. 2d 383 (La. Ct. App. 1982) (finding breach of contract where airline failed to notify passengers of unscheduled stop); *Mathews* v. *Northwest Airlines, Inc.*, 536 N.Y.S.2d 338 (App. Div. 1988) (denying recovery under contract for refund for flight missed due to illness); *Slentz* v. *American Airlines, Inc.*, 817 S.W.2d 366 (Tex. Ct. App. 1991) (refusing to find contract-based warranty of safe carriage covering injury to passenger in airport). We do not necessarily endorse the claims or results in these cases.

[19] See *Nader*, 426 U.S. at 294-295. The Court stated in *Nader* that, under the federal regulations, "[p]assengers are free to reject the compensation offered in favor of a common-law suit for damages suffered as a result of the bumping." *Ibid.* The Court observed that "[t]he contemplation that common-law remedies will continue to exist is in conformance with longstanding [CAB] policy," and that the CAB "specifically rejected the carriers' proposal that the denied boarding compensation be made an exclusive remedy." *Id.* at 307 n.18.

[20] See 14 C.F.R. 250.9(b) (declaring, under "Method of Payment" in text of required statement to passengers, that "[t]he passenger may * * * refuse all compensation and bring private legal action"). The bumping regulations were referred to with approval in the CAB

DOT has officially noted that frequent flyer programs are governed by both contract law and 49 U.S.C. App. 1381.[21] DOT has taken the position that contract claims arising out of frequent flyer contracts generally are not preempted. DOT's own consumer literature specifies that dissatisfied consumers unable informally to resolve complaints against airlines regarding frequent flyer programs "may wish to consider legal action through the appropriate

Statements of General Policy implementing Section 1305. 44 Fed. Reg. 9948, 9950 (1979); see also 47 Fed. Reg. 52,982 (1982) ("[i]n the exceptional case where the regulatory DBC payment is not adequate compensation, the passenger is free to refuse it and bring private legal action"); *id.* at 52,983 (involuntarily bumped passengers "will still, of course, be free in these situations to take action against carriers in situations where they feel it is justified").

[21] See DOT Order Denying Rulemaking (Pet. App. 96a & n.17) (referring to airline position that "correctly describes the relationship between frequent flyer programs and their members as a contract in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier," but explaining that the carrier-passenger relationship is not "governed solely by contract law," because Section 1381 also applies); DOT Order 89-9-25, *Complaints of American Association of Discount Travel Brokers to American Airlines Passenger Tariffs, CAB Nos. 465 and 409*, at 2 (Sept. 13, 1989) (characterizing frequent flyer program terms as "a matter of private contract" between passengers and airlines).

American in its certiorari petition contends that DOT has already "plainly indicated" in its Order Denying Rulemaking that Section 1305(a)(1) would preempt contract claims relating to frequent flyer program changes (Pet. 28), but that is not the case. There DOT stated, consistent with its position here, that contract law "cannot authorize a determination of whether individual terms and conditions of a carrier's program are fair and reasonable." Pet. App. 102a. That is so because (1) contract law is not concerned with assessing the fairness and reasonableness of policies, but rather with effectuating parties' agreements, and (2) to the extent that a state court does attempt to carry out "state regulation" through its contract law, it would be preempted.

civil court."[22] The DOT regulation governing lost, delayed or damaged baggage also refers to "baggage liability to passengers," and plainly contemplates that passengers may bring legal action. See 14 C.F.R. Pt. 254.

F. One function served by Section 1305(a)(1) is to protect competition among interstate carriers from the added burdens that would result from the potential imposition of *non-uniform* state standards. State-court enforcement of the terms of a uniform agreement prepared by an airline and entered into with its passengers nationwide presents a significantly reduced risk of such non-uniformity, and as noted above (see page 20, *supra*), the legislative history does not identify any such risk with respect to claims based on private contracts as a concern leading to the enactment of Section 1305(a)(1).[23] To be sure, different courts adjudicating a claim for breach of a contract of carriage or a frequent flyer contract might be called upon to apply background principles of state contract law and might reach different results. But contract law is not, at its core, "diverse, nonuniform, and confusing," *Cipollone*, 112 S. Ct. at 2624 (plurality opinion), because it universally rests on the parties' voluntary agreement to a specified exchange. A contract is simply "[a]n agreement between two * * * persons which creates an obligation." *Black's Law Dictionary* 322 (6th ed. 1990).[24] And contract principles are relied upon each

[22] See United States Dep't of Transportation, *Plane Talk: Facts for Air Travelers From the Consumer Affairs Office* 2 (1992).

[23] DOT has recognized that "[u]sually, businesses operating in several jurisdictions are able to utilize uniform contracts by complying with the most restrictive State law." 47 Fed. Reg. 5235 (1982).

[24] Cf. *Nader*, 426 U.S. at 304 (determining that "considerations of uniformity in regulation" did not require reference of common-law claims to the CAB under principles of primary jurisdiction). With the enactment of Section 1305(a)(1) subsequent to *Nader*, together with Congress's expressed intent to achieve regulatory uniformity (See H.R. Rep. No. 793, 98th Cong., 2d Sess. 4 (1984)), however, we believe that principles of primary jurisdiction might appropriately play a more

day by countless interstate businesses without apparent anti-competitive effects of the sort the ADA was enacted to overcome. Some state-law principles of contract law (such as the doctrine of unconscionability) might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties. See pages 16, 17-18, *supra*, and 29-30, *infra*. But we do not believe that any such limitations on state-court adjudication of contract claims in particular cases require the complete preemption of all state-law contract claims.

G. This case is before the Court on review of the Illinois Supreme Court's decision affirming the trial court's denial of American's motion to dismiss the complaints on preemption grounds. Because state-law breach-of-contract claims are not categorically preempted by Section 1305(a)(1), we cannot say at this stage of the proceedings that the trial court erred, even though we do not embrace the reasoning of the Illinois courts in addressing the preemption issue. In the course of further proceedings on remand, however, it may well develop that respondents' claims, although cast in breach-of-contract terms, would properly be held to be preempted, in whole or in part.

It is unclear, for example, to what extent (if at all) the Supreme Court of Illinois may have relied on the Consumer Fraud Act (or comparable common-law principles) in evaluating the implications under contract law of American's reservation of rights to change its frequent flyer program. Respondents' contract claims would presumably not be preempted if, for example, American had not made the disputed changes, but simply refused to grant travel awards to passengers who accumulated the requisite miles and otherwise met program conditions. The impact of American's reservation of rights to change its program on the preemption analysis is, however, less

significant role under the ADA than they did under the pre-ADA regime.

clear.[25] The court did not separately consider whether any determination that American's reservation of rights was inadequate to defend it against a claim of breach of contract would depend on the Consumer Fraud Act standard of adequate notice, or whether traditional common-law contract principles would independently yield the same result. The Supreme Court of Illinois instead treated the contract and Consumer Fraud Act claims as identical for preemption purposes, and found both non-preempted on the erroneous rationale that frequent flyer programs are not "essential" to airline operations. Pet. App. 6a.

The core contract law that we believe is not preempted is the body of contract principles upon which States traditionally rely to enforce agreements actually entered into between parties and to remedy the breach of such agreements. Section 1305(a)(1) does, however, prohibit a State from interpreting and applying its state law of contracts to impose its own substantive policy choices on airlines, and thereby to achieve the functional equivalent of the regulation the ADA expressly prohibits. Invocation of state common-law principles to interpret contracts in light of public policy, such as policy derived from state legislation, see generally 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 5.5, at 53 (1990), may fundamentally alter the parties' agreement in order to further state policy goals external thereto, and thereby amount to impermissible enforcement of state standards under Section 1305(a)(1). Likewise, application of certain state common-law principles or the granting of certain relief may also be preempted by Section 1305(a)(1) to the extent they would result in a failure to effectuate the agreement as written or directly affect rates and services.

[25] The extent, if any, to which American expressly promised each of the frequent flyer program benefits that respondents claim is also unclear.

Because the interpretation of Illinois law is primarily within the province of the state courts, and because this case is at the most preliminary stages in the trial court, there is no occasion here to analyze further the extent to which respondents' contract claims may turn upon state policies that are independent of the intent of the parties or are not part of the traditional common law applicable to contracts, and may therefore be preempted. The judgment of the Supreme Court of Illinois should be reversed insofar as it addresses respondents' contract claims, and the case should be remanded for further proceedings on those claims.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed, and the case should be remanded for further proceedings on respondents' contract claims.

Respectfully submitted.

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No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICUS CURIAE* UNITED AIR LINES, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions in the Petition for a Writ of Certiorari, which this Court granted, are:

1. Does the express pre-emption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, pre-empt only those state law claims that relate to "essential" airline operations?

2. Does the scope of pre-emption under Section 1305 depend on the form of relief requested?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae United Air Lines, Inc. ("United") is one of the Nation's largest commercial airlines. It has a direct interest in the outcome of this case.[1] Like petitioner American Airlines, Inc. ("American"), United has been sued in Illinois for violation of that State's Consumer Fraud and Deceptive Trade Practice Act and for

[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

breach of contract, based on United's exercise of its long-standing, published rights to adjust the rules of its Mileage Plus Frequent Flier Program ("Mileage Plus Program"). *See, e.g., Silver, et al.* v. *United Air Lines*, No. 93 CH 11098, *pending* Cook Cty. Ill. Cir. Ct.; *Greenberg, et al.* v. *United Airlines, Inc.*, No. 94 CH 499, Cook Cty. Ill. Cir. Ct., (dismissed with leave to refile after a decision in this case). Because the Supreme Court of Illinois has failed to give full pre-emptive effect to 49 U.S.C. App. § 1305, that State has now become a hotbed for nationwide class actions against United and other airlines challenging changes to frequent flyer programs. *See, e.g. id*; *Ryan* v. *Delta Airlines*, No. 88 CH 4846, *pending* Cook Cty. Ill. Cir. Ct. (challenging aspects of Delta's frequent flyer program) (dismissed with leave to refile after a decision in this case).

INTRODUCTION

United files this brief urging reversal of the judgment of the Supreme Court of Illinois. We will not repeat all the arguments ably presented by Petitioner American in support of reversal of the judgment below. Instead, as *amicus curiae*, we will focus and expand upon only six important propositions bearing on the resolution of this case.

ARGUMENT

I. A PRESUMPTION AGAINST PRE-EMPTION DOES NOT LIMIT THE NATURAL AND INTENDED SCOPE OF AN EXPRESS PRE-EMPTION PROVISION.

In support of the judgment below, respondents are likely to rely on the so-called " 'presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation.' " *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2055 (1992) (Stevens, J., dissenting)(quoting *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 740 (1985)). In our view, this Court's prior cases establish—consistent with basic principles of democratic theory—that a presumption against pre-emption should not be applied to limit the natural and intended scope of an express pre-emption provision.

There is, in the first instance, no presumption against Congress' exercise of its enumerated powers. Courts are obligated to accord a statute supported by a constitutional grant of power its full and natural effect whether or not, by reason of the Supremacy Clause, the statute pre-empts laws regulating matters traditionally within the scope of state regulation. Thus, in determining what effect to give an express pre-emption clause, this Court has given *controlling* weight to the intent of Congress as revealed by the language, history, and structure of the statute. This is as it should be, since Congress' will, exercised within the perimeter of its constitutional power, authoritatively controls.

For example, in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), this Court held that the pre-emption provision in the 1965 version of Federal Cigarette Labeling and Advertising Act was written "precisely and narrowly," and therefore it was appropriate to apply that provision in light of a presumption against pre-emption. *Id.* at 2618. However, with respect to the 1969 version of the same Act, this Court held that because "the plain

language of the pre-emption provision in the 1969 Act is much broader," *id.* at 2619, it would be wrong to construe that provision "narrowly," *id.* at 2621, *i.e.*, in light of a presumption against pre-emption. *See also Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-38 (not relying on or addressing presumption against pre-emption in interpreting preemption provision of Airline Deregulation Act of 1978, in which Congress used "broad" and "deliberately expansive" language).[2]

Our point is this: At least in instances of *express* pre-emption by Congress,[3] a so-called presumption against

[2] *See also Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990) (holding that because Congress "has expressly included a broadly worded pre-emption provision" it is appropriate to apply it "expansively"); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (holding that, because "[t]he breadth of § 514(a)'s [of ERISA] pre-emptive reach is apparent from that section's language," "[w]e must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning"); *Ramah Navajo School Bd., Inc.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982), later proceeding, 720 P.2d 1243 (N.M.), *cert. denied*, 479 U.S. 940 (1986) (holding that pre-emption analysis requires a "particularized examination" of the relevant federal law, and where federal policies require broad pre-emption, "federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity").

[3] A presumption against pre-emption has more bite when the issue is whether Congress has *impliedly* pre-empted state law. *See, e.g., Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146-52 (1963) (applying presumption against pre-emption where party argued implied pre-emption of state law); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236-37 (1947) (same). In the implied pre-emption context, it is reasonable for the courts to assume that Congress did not intend to disable the States from acting unless there is some affirmative indication otherwise. However, where Congress has included an express pre-emption provision, the plain and natural effect of the language chosen by Congress should control, and there is less, if any, role for a "thumb on the scale" in the form of a presumption against pre-emption.

preemption carries little or no water divorced from the intent of Congress, as revealed by the language, history, and structure of the provision in question. Or, as the Court put it *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138 (1990), " '[t]he purpose of Congress is the *ultimate touchstone*,' " in determining whether a pre-emption provision will be broadly or narrowly construed. This is but another way of saying that Congress' will, once discerned through the traditional interpretative process, must be faithfully enforced. Thus, where, as here, Congress has drafted a pre-emption provision using purposefully broad language (*i.e.*, "any law" "relating to" rates, routes or services, 49 U.S.C. App. § 1305(a)(1)), *see Morales*, at 2037-38, a presumption against pre-empetion cannot be applied to limit the reach of Congress' intended action—namely, to effect broad pre-emption.[4]

II. THE TERMS OF FREQUENT FLYER PROGRAMS ARE PLAINLY PART OF THE "RATES, ROUTES, OR SERVICES" OF AIR CARRIERS.

The critical issue, then, is Congress' intent, as conveyed by the language of the statute. As we discuss below in Parts II-IV, the unambiguous and expansive language in section 1305(a)(1) pre-empts the state-law actions at issue in this case.

[4] There is another reason why it would be inappropriate to apply in this case a "presum[ption] that Congress did not intend to pre-empt areas of tradition state regulation." *Metropolitan Life*, 471 U.S. at 740. Regulation of interstate airline rates is *not* an area of "traditional state regulation." Because, as we discuss below (and Petitioner discusses its brief), an airline's frequent flyer program is part of the "rates" charged, and "services" provided, by the airline, the subject-matter of these cases (the terms of frequent flyer programs) does not fall with an area of traditional state regulation. Prior to the enactment of the Airline Deregulation Act of 1978 ("ADA"), the federal government, not the States, regulated the rates, routes, and services of interstate airlines. Therefore, in no event, is a presumption against pre-emption applicable here.

Section 1305(a)(1) pre-empts the enforcement of any state law "relating to" the "rates, routes, and services" of air carriers. The terms of frequent flyer programs are plainly part of the "rates, routes, and services" charged by airlines.

A "rate" is "the cost per unit of a commodity or service." American Heritage Dictionary, 1027 (Rev. Ed. 1982). The terms of frequent flyer programs fit comfortably within this definition. Although the details of frequent flyer programs vary from airline to airline, their basic structure is the same: After joining the program, passengers accrue points for each flight they take. These points can be cashed in for, among other things, "free" travel or upgrades to a higher class of service. Five round trip flights from New York to Los Angeles might, for example, earn a member of the program sufficient mileage points to redeem a sixth "free" flight within the continental United States.

The economic effect of the frequent flyer award in this example is to provide a premium to the passenger to travel the first five flights. The frequent flyer award is merely a complex incentive program that is an integral part of the rate structure and services of the airlines. In any meaningful economic sense, therefore, the terms of frequent flyer programs are part of the "rates" charged and "services" provided by a major air carrier.

The common-sense economic understanding of the terms of frequent flyer programs as part of the overall "rates" charged by airlines is confirmed by the actions of one of the relevant goverment agencies formerly charged with enforcing the ADA—the Civil Aeronautics Board ("CAB")—interpreting both the ADA and related legislation:

First, when the ADA was passed, the CAB issued an order interpreting the scope of pre-emption under § 1305 (a)(1). In that order, the CAB expressly concluded that "preemption extends to all of the economic factors that

go into the provision of the *quid pro quo* for passenger's fare . . . and we hereby occupy these fields completely." 44 Fed. Reg. 9948, 9951 (1979). This interpretation is entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984). As discussed above, the terms of a frequent flyer award are one of the "economic factors" that affect the true fare paid by the passenger, and are thus part of the "rate" charged by the airline with the meaning of the CAB interpretation of the statute.

Second, this understanding is also consistent with the CAB's interpretation of related legislation—the Federal Aviation Act ("FAA"). Section 1108(b) of the FAA generally forbids foreign air carriers from taking on, "at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States." 49 U.S.C. § 1508(b) In 1983, Trans World Airlines and Qantas Airways filed for CAB approval of an agreement that allowed Qantas' passengers to participate in TWA's Frequent Flight Bonus Program. The agreement included provisions of Qantas to provide, as an award on TWA's program, transportation between the West Coast of the United States and Hawaii.

In disapproving the airlines' agreement, the CAB rejected the argument that "free" award travel was not for compensation and therefore not prohibited by the act. The CAB found that "[c]onsumers pay the carriers not only in return for specific transportation services but also in anticipation of some future benefit." U.S. Civil Aeronautics Board, Order 84-2-61, 106 C.A.B. 351 (February 14, 1984), at 2. The CAB thus recognized, once again, that the possibility of future free air travel is part of what consumers pay for a flight, and is thus part of the "rate" charged by airlines.

Moreover, the treatment of frequent flyer programs under a *regulatory* regime further confirms that the terms

of such programs are part of the "rates, routes, or services" of air carriers. Those foreign governments that require the filing of airline tariffs generally also require the filing of frequent flyer award program schedules.[5] Similarly, in the United States, even after the passage of the ADA, Department of Transportation regulations mandate the filing of rates, fares and services for *foreign* air transportation.[6] 14 C.F.R. § 221.3. Since the introduction of frequent flyer bonus programs in 1981, airlines have voluntarily filed award bonuses in their tariff with the Department of Transportation. Indeed, Department of Transportation Order 89-9-25 confirms that "both the CAB and the [DOT] have accepted [frequent flyer award bonuses] as appropriate binding tariff material consistent with the well-established practice of filing air fare discounts." U.S. Department of Transportation Order 89-9-25 (Sept. 13, 1989), 1989 WL 25637, *1 (D.O.T.), at 4. The fact that foreign governments require such tariffs to include information regarding the award schedule of frequent flyer programs, and the U.S. Department of Transportation, in certain circumstances, accepts such information as appropriate tariff materials, tends to confirm that the terms of those programs are part of the "rates, routes, and services" of air carriers.

In sum, both common-sense economics and the prior interpretations of relevant government agencies make

[5] *See, e.g. generally* U.S. Dept. of Trans. Order No. 91-6-29 (June 25, 1991), 1991 WL 248400 (D.O.T.) (dismissing complaint filed by Air France against Pan American World Airways for failure to file cash bonus offer as tariff with the Government of France).

[6] "Foreign air transportation" is defined as "the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . in commerce between . . . a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia. . . ." 49 U.S.C. App. § 1301(24)(a).

clear that the terms of frequent flyer programs are part of the "rates, routes, or services" of air carriers within the meaning of the ADA. Therefore, as we discuss below, a state-law action challenging changes to those terms is preempted by § 1305(a)(1). *See* Part IV, *infra*. That should end this case.

III. FREQUENT FLYER PROGRAMS ARE AN IMPORTANT PART OF AIRLINE PRICING IN A DEREGULATED MARKET, PROVIDING HEAVILY-REDUCED FARES TO TRAVELLERS. WITHOUT THE ABILITY TO ADJUST PERIODICALLY THE TERMS OF THEIR FREQUENT FLYER PROGRAMS, THE AIRLINES WOULD BE UNABLE TO OFFER SUCH HEAVILY-REDUCED FARES.

Frequent flyer programs are an important part of how airlines in a deregulated market provide heavily-reduced fares to travellers. Such reduced fares are the hallmark of airline pricing in a deregulated free market. While some passengers may miss the days of half-empty flights under a regulated fare structure, it is the ability of airlines to fill their planes with discount seats that has led to the significant overall reduction in airfares under deregulation.

The economics of air travel require the plane to be filled with passengers who pay radically different prices. As this Court noted in *Morales*, the expenses involved in operating an airline flight are almost entirely fixed costs—they increase relatively little with each additional passenger. *See* 112 S. Ct. at 2040. Fully utilizing capacity is therefore the key to keeping airfares low as it is the only way to reduce the actual "average" cost per passenger.

If airlines charged all customers this average price, however, many seats would go empty and prices would have to be higher to cover costs. Many consumers would not fly, even though they would willingly pay the actual (i.e., marginal) cost of their transportation. Airlines would

also not be able to offer as many flights as they do now, further inconveniencing passengers and driving up costs.

Reaping the benefits of deregulation requires differentiating those passengers who need, and are willing to pay for, frequent flights without advance purchase from those customers who do not value this flexibility so highly. The shorthand for this distinction is often made between "business" travellers on the one hand and "leisure" travellers on the other.[7] For the airlines to be able to offer substantially lower fares to "leisure" travellers, they must be able to restrict those fares to flights where there are likely to be more empty seats and to adjust regularly those restrictions to shifting demand, cost, and other market forces.

By controlling the allocation of the frequent flyer discounts—using them primarily to fill seats that would otherwise go empty—the airlines are able to transport millions of leisure travellers annually at very low cost. Frequent flyer programs provide one of the most popular[8] and heavily-reduced fares and generally do so, as one would expect, with greater restrictions than most reduced fares. This reduction, like all market prices, strikes a mutually beneficial balance between the cost of the item produced and value of the benefit received. The airlines are able to reduce their costs by retaining a large degree of flexibility in the amount of the awards and when and how they may be redeemed. The consumer, who bears a certain amount of disclosed risk about the precise value of the future

[7] The "business" versus "leisure" traveller distinction is merely a shorthand for the distinction between those passengers who are able and willing to pay significantly more for the convenience of more frequent flights with no advance purchase and those who are not. Of course, many business travellers also rely on the availability of lower fares.

[8] On average, approximately 8.5% of the passenger miles flown on United are paid for with frequent flyer points. On some flights more than half of the passengers fly with frequent flyer awards.

benefit of his mileage credits,[9] nevertheless benefits not only from the deep reduction in fare, but also from the significant discretion he maintains as to when and how he will redeem the miles.

The dynamic of heavly-reduced fares available through frequent flyer membership simply would not work if the airlines were not able to adjust periodically the terms of the frequent flyer programs in light of evolving demand and cost factors. Airlines must be able to adjust the number of seats on a particular flight available to be paid for with frequent flyer awards in light of shifting market demand. They must also be able to adjust the so-called "blackout" dates—those dates on which few seats are likely to be empty, and thus certain frequent flyer awards cannot be used—to changing demand. Finally, the airlines must be able to manage, to some degree, the timing and volume of frequent flyer redemptions over a period of time so that costs do not at any time greatly exceed revenues. In short, without the ability to adjust periodically the terms of their frequent flyer programs, the airlines would simply be unable to maintain such programs, at least in their current form, and provide maximum fare reduction to consumers.

Indeed, that is essentially what the Department of Transportation found when it rejected a challenge to the airlines' right to modify the terms of frequent flyer programs. The Department concluded that reserving the right to modify program rules and imposing capacity controls and blackout dates "seem to be legitimate methods for controlling the cost of frequent flyer plans." U.S. Dept.

[9] Such uncertainty would be inherent in frequent flyer programs even if airlines could not unilaterally change program rules or impose blackout or other capacity constraints. The value of award travel is affected by a host of factors that even respondents do not seek to regulate. When an airline expands its route system to a popular destination, for example, the value of miles is increased. When market forces drive down the price of other discount fares, the value of "free" travel decreases.

of Transportation Order 92-5-60 (May 29, 1992), 1992 WL 133179, *7 (D.O.T.). The Department found that "[w]ithout such restrictions, carriers might choose to terminate or cut back the programs." *Id.*

In short, in order to maintain the complex and heavily-reduced fare structure embodied in the frequent flyer programs, the airlines must periodically adjust the terms of those programs.

IV. STATE-LAW ACTIONS CHALLENGING CHANGES TO THE TERMS OF FREQUENT FLYER PROGRAMS PLAINLY "RELAT[E] TO" THE ROUTES, RATES, OR SERVICES OF AIRLINES, AND ARE THEREFORE PRE-EMPTED BY SECTION 1305(a)(1).

Section 1305(a)(1) pre-empts the enforcement of any state law "relating to" the rates, routes, or services of air carriers. In *Morales*, this Court held that the "key phrase" in the statute—"relating to"—expressed a "broad pre-emptive purpose" and was meant by Congress to be "deliberately expansive.'" 112 S. Ct. at 2037 (internal citation omitted). The Court held that all "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services,' are pre-empted under 49 U.S.C. App. § 1305(a)(1)." *Id.*

Under this standard, it is quite plain that a state-law action challenging an airline's adjustment of the terms of its frequent flyer program is pre-empted.

At the most fundamental level, a state-law action challenging adjustments to the terms of a frequent flyer program is pre-empted *merely because* the terms of a frequent flyer program are, as we discuss above in Part II, part of the "rates" charged and the "services" provided by airlines. Thus, by its very nature, an action challenging changes to the terms of a frequent flyer program challenges the "rates" and "services" of the airline, or at the very least, "ha[s] a connection with or reference to" airline "rates, routes, or services," which all that is necessary under § 1305(a)(1) to pre-empt state law.

In our view, it is not necessary even to show that the state-law action would have a significant impact on the "rates" or "services" airlines. That is so because, as this Court expressly recognized in *Morales*, a pre-emption clause extending to all state laws "*relating to*" rates, routes, or services is much broader than one that is limited to state laws that "*regulate*" rates, routes, and services. 112 S. Ct. at 2037-38. The key statutory phrase ("relating to")—defined by this Court in *Morales* as "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,'" 112 S. Ct. at 2037 (quoting Black's Law Dictionary, 1158 (5th Ed. 1979)—pre-empts not only those actions shown to have a significant impact on rates (and thereby "regulating" them), *but also* those actions that merely "have [some] connection" to airline rates or services, even if it is not certain whether the action will significantly impact the rates. By choosing the broad "relating to" language, Congress intended to err on the side of keeping the states out of the area of "rates, routes, and services" *completely*, rather than requiring a case-by-case showing of the impact of the state law on those items.

Thus, one of the two key distinctions relied on by the Illinois Supreme Court—that an action for damages (as opposed to an action for injunctive relief) does not impact the rates or services of airlines directly enough to be pre-empted—is not merely wrong (as Petitioner thoroughly demonstrates), it is also largely irrelevant.[10] The

[10] The other reason relied on by the Illinois Supreme Court to avoid pre-emption—that frequent flyer programs have not, historically, been "essential" to airline operation—is also plainly wrong. There is no support in the language of § 1305(a)(1) for the proposition that Congress intended to keep the States out of only the most essential aspects of airline operations. To the contrary, reading into the statute an "essential to operations" limitation is thoroughly contrary to the "deliberately expansive" language chosen by

key "relating to" language is broad enough to cover any state-law action having some real connection with airline rates, routes, or services, whether or not the airlines can demonstrate in the case at hand that the state-law action will have a significant impact on their rates, routes, and services. That is the clear import of the "broad," "sweep-[ing]," and "deliberately expansive" language, *Morales*, 112 S. Ct. at 2037, chosen by Congress.

Even if, however, it were necessary to show "as an economic matter" that state-law actions challenging adjustments to the terms of frequent flyer programs had some "forbidden significant effect upon fares," *see Morales*, 112 S. Ct. at 2039, such a showing is easily made in this case. The actions in this case challenge American Airlines' decision to exercise its reserved right to adjust the number of seats set aside for AAdvantage members and the "blackout" dates on which certain kinds of AAdvantage frequent flyer awards can be used. *See, e.g., Wolens* v. *American Airlines*, Complaint, paragraph 4; App. 50a; *Tucker* v. *American Airlines*, Complaint, paragraph 14; App. 65a. Similarly, in the cases in which *amicus* United is involved, the plaintiffs challenge United's adjustments to the terms of its Mileage Plus program with respect to the number of miles required to earn award travel, notwithstanding United's express reservation of the right to make such changes in its published Mileage Plus rules. *See, e.g., Silver, supra*; *Greenberg, supra*.

As we have described above in Part III, without the ability to adjust periodically the terms of their frequent flyer programs to accommodate changes in demand for specified routes and other factors, the airlines would be unable to maintain the popular frequent flyer programs, at least at the size and generous award levels that cur-

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Congress. *Morales*, 112 S. Ct. at 2037. Moreover, such a limitation, which ties foreberance by the States to an historical notion of what was essential to airlines "rates, routes, or services" is contrary to one of the overall objectives of the ADA, which was to promote new and innovative fare structures by deregulating them.

rently exist. Indeed, as noted, the Department of Transportation has previously found that periodic revisions to the terms of frequent flyer programs are "legitimate methods for controlling the cost of [such] plans," and that without the right to make such changes, the airlines might well be required to "terminate or cut back the programs." U.S. Department of Transportation, Order 92-5-60 (May 29, 1992), 1992 WL 133179, *7 (D.O.T.). Thus, if Respondents' actions were allowed to go forward and possibly prevail, the nature and scope of the airlines' frequent flyer awards would necessarily change. Since (as we have described) frequent flyer awards are merely part of the innovative "rate" structure and "services" of the airlines, the changes affected by Respondents' actions would necessarily have the forbidden impact on the airlines' "rates, routes, or services."

Indeed, in *Morales*, this Court relied on the very same sort of economic reasoning, based on "the dynamics of the air transportation industry," to invalidate the National Association of Attorneys General's ("NAAG") restrictions on airline fare advertisements. 112 S. Ct. at 2040. The Court noted that in order to be able to offer lower fares to price-conscious travellers, the airlines must be able to place substantial restrictions on the availability of the lower-priced seats and must be able to advertise the lower fares. The Court found that the NAAG restrictions of advertisement burdened the ability of the airlines to place the sort of restrictions necessary to be able to offer price-conscious travelers lower fares, and therefore was pre-empted. *See id.*

Here, precisely the same dynamic is operating: If Respondents' actions were allowed to go forward, they would substantially burden the ability of the airlines to offer the current heavily-reduced fares represented by existing frequent flyer programs. In that sense, the current actions would, as least as much as the NAAG guidelines invalidated in *Morales*, have a forbidden impact on

the "rates, routes, or services" of the airlines. Therefore, they are clearly pre-empted by section 1305(a)(1).

V. STATE-LAW ACTIONS CHALLENGING ADJUSTMENTS TO THE TERMS OF FREQUENT FLYER PROGRAMS WOULD MORE CLEARLY FRUSTRATE THE GOALS OF THE ADA THAN THE LAWS FOUND PRE-EMPTED IN *MORALES*.

As this Court noted in *Morales*, the primary purpose of the ADA was to promote "efficiency, innovation, and low prices" for "variety [and] quality . . . of air transportation services" through "maximum reliance on competitive market forces." 112 S. Ct. at 2034. With respect to § 1305(a)(1) in particular, the CAB has noted that the statute was meant to further the two important objectives of "preventing State economic regulation from frustrating the benefits of decreased Federal regulation," and "preventing conflicts and inconsistent regulations . . . ." 44 Fed. Reg. 9948-49 (quoting H. Rep. No. 95-1211, at 16). The actions at issue here—state-law challenges to an airline's exercise of its right to adjust the terms of its frequent flyer program—would frustrate these goals *far worse* than the laws found by this Court in *Morales* to be pre-empted.

First, the laws found to be pre-empted in *Morales*—NAAG guidelines governing the content and format of airline advertising—did not relate to airline "rates, routes, and services" as directly as the laws at issue here. Rather, in *Morales*, the advertising guidelines were one step removed from the forbidden subjects, relating only to the *advertisement* of rates and other matters. Here, by contrast, the state-law actions at issue relate *directly* to one important aspect of the current, innovative rate and service structure of airlines—the frequent flyer programs. Thus, the state law interference with the federally-mandated deregulatory regime is more direct than it was in *Morales*.

Second, at least the NAAG guidelines in *Morales* attempted to impose uniformity on the States in their attempt to regulate airline advertisements. Here, by contrast, potential causes of action against the airlines for changes to the terms of their frequent flyer programs will vary widely from state to state based on differences in the States' common and statutory laws. Thus, for example, some States—namely, those States that still maintain a more Willistonian view of contracts—would allow the airlines to develop and maintain more ambitious frequent flyer programs that depend on the airlines' ability to reserve the right to make changes to such programs. Other States, however, where traditional notions of contract law are more completely dead (and modern quasi-tort law notions like unconscionability and fundamental fairness reign), would more severely restrict the airlines' ability to maintain ambitious frequent flyer programs.

The result of such balkanization is not merely "conflicting and inconsistent regulations," which (as the CAB has pointed out, 44 Fed. Reg. 9948 (Feb. 15, 1979) is an evil that § 1305(a)(1) was intended to prevent, *but also* suppressed innovation by airlines *nationwide*. Air transportation is true interstate commerce. It is impossible to maintain different frequent flyer programs for each State. Thus, if the States are allowed to regulate frequent flyer programs through common law and statutory causes of action, then the airlines will necessarily be forced to comply with *the most restrictive* State's law. The result is that the airlines will be bound by what might be called a "least common innovator" rule with respect to frequent flyer programs and their concommitant heavily-reduced leisure fares. That would frustrate, on a nationwide scale, the core purposes of the ADA.

Respondents may argue that it would not frustrate the objectives of the ADA merely to allow them to bring an action for damages for breach of alleged "contractual" obligations assumed by the airlines in their frequent flyer programs because such an action merely enforces bar-

gains voluntarily entered into by the airlines.[11] This argument fails for three different reasons:

First, and entirely dispositive, a breach of contract action relating to the "rates, routes, and services" of air carriers falls squarely into the purposefully broad language chosen by Congress in § 1305(a)(1). It is the "enforce[ment]" by the state court system of the common "law" of contracts with respect to a matter relating to the rates, routes, or services of the airlines.

Second, the argument that the kind of breach of contract action at issue here is not pre-empted elevates form over substance. The gravamen of actions such as Respondents' is a challenge to the airlines' right to make adjustments to their frequent flyer programs *even where the airlines have reserved the right to make such changes.* For example, the reservation of rights contained in the United Mileage Plus Program simply could not be more explicit and thorough,[12] yet it has been the object of state-

[11] In these actions, the airlines take the position that the frequent flyer programs create no contractual obligations. Indeed, that is the plain import of the reservations of rights contained in most programs. *See infra* n.13.

[12] The Mileage Plus rules expressly reserve United's right to make adjustments to the terms of the program, even though those changes may affect the value of mileage already accrued:

> United has the right to terminate the program, or to change the program rules, regulations, benefits, conditions of participation, or mileage levels, in whole or in part, at any time with or without notice, even though changes may affect the value of the mileage or Certificates already accumulated. United may, among other things, withdraw, limit, modify or cancel any award, increase mileage or number of Certificates required for any award, modify or regulate the transferability of awards or benefits, add an unlimited number of blackout days, or limit the number of seats available to any or all destination. Members, in accumulating mileage or Certificates, may not rely on the continued availability of any award or award level, and members may not be able to obtain all offered awards or to use awards to all destinations or on all flights.

July 1988 Mileage Plus Program Rules ¶ 1, Terms and Conditions.

law contract actions. What Respondents *really* challenge in these actions, based on modern so-called "contract" notions, is the right of the airlines to offer a frequent flyer program while reserving the right to make changes based on notions of commercial fairness. As we have discussed, if such actions are allowed to proceed, the airlines will be unable to maintain the innovative fare and service structures embodied in the frequent flyer programs. *See supra* Part III. That is what is at stake in these cases, not the right to enforce voluntary contractual obligations having nothing to do with "rates, routes, or services."

Finally, it would both be impractical and frustrate the will of Congress to allow the state courts to attempt to determine which actions merely attempt to enforce voluntary "contractual" obligations assumed by the airlines and which actions, in substance, challenge directly the right of the airlines to offer an innovative fare or incentive structures such as the frequent flyer programs. That, we suggest, is precisely the situation that Congress sought to avoid when it chose the "deliberately expansive" language of § 1305(a)(1). Congress sought to pre-empt state regulation *completely* in the area of airline rates, routes and services, rather than to allow the state courts to draw lines between various different state-law causes of action challenging matters falling within the prohibited subjects.

VI. THE PRE-EMPTION OF STATE LAW DOES NOT LEAVE THE CONDUCT OF THE AIRLINES UNCHECKED IN THIS AREA.

Finally, holding that the state-law actions at issue in these cases are pre-empted does not leave unchecked the airlines' conduct with respect to the operation of frequent flyer programs. To the contrary:

First, as this Court expressly noted in *Morales*, the fact that Congress pre-empted the application of state commercial laws to matters relating to airline rates, routes, or services "does not give airlines carte blanche to lie to

and deceive consumers." 112 S. Ct. at 2040. Rather, as the Court noted, "the DOT retains the power" to prohibit the airlines from engaging in fraudulent practices. *Id.* In its brief, Petitioner thoroughly reviews the DOT's enforcement powers, and we will not repeat that discussion here.

Second, in addition to DOT enforcement powers, the market itself guards against unfair or otherwise egregious conduct by the airlines. The airlines compete vigorously with respect to the terms of their frequent flyer programs. Just as market forces periodically propel the airlines into "fare wars," the airlines' frequent flyer programs periodically engage in "mileage wars."[13] The upshot of this vigorous competition is that no airline is likely to get away with deceptive and unfair practices with respect to the terms of their frequent flyer programs. This sort of market check is precisely what Congress envisioned when, in passing the ADA, it determined that "'maximum reliance'" should be placed on "'competitive market forces.'" *Morales*, 112 S. Ct. at 2034 (quoting 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9)).

[13] For example, in 1987, Delta introduced a triple-mileage program where, for a limited time, certain flights would earn three times the usual credit. *See* "Latest Frequent Flyer Deals Garner Praise," 299 *Aviation Daily* 25:247 (February 5, 1990). Most other airlines matched this price reduction within days. In January, 1990, the airlines launched another round of triple-mileage promotions. *See* "Airline Freebies Upset Business," Gannet News Service, January 30, 1990. More recently, a spate of European and Asian carriers have introduced variants of frequent flyer programs to compete with the U.S. carriers. *See, e.g.*, "New European Frequent Flyer Programs," *International Herald Tribune*, July 24, 1992; "European Airlines Launch Frequent Flyer Programs," October, 1991 *Airline Business* 34. "Asia Drawn Into Line; Quantas' New Frequent Flyer Program Causes Intense Competition In The Asian Air Travel Market," October 1992 *Airline Business* 41.

CONCLUSION

For all the reasons stated herein, and in Petitioner American's brief, the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,
v.
MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a class action suit under state common law seeking damages for an alleged failure to make airline seats available to frequent flyers at a particular rate (free with frequent flyer credits) an effort by the State to enforce a law relating to the rates and services of an airline, and therefore pre-empted under 49 U.S.C. App. § 1305(a)(1) and this Court's decision in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992)?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Air Transport Association of America ("ATA") is a non-profit unincorporated trade association of federally certificated air carriers providing scheduled passenger and cargo service. ATA's members account for more than 95 percent of the domestic passenger and cargo traffic flown annually by United States carriers.[1]

[1] ATA's members are: Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express, Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Air Lines, United Parcel Services, and USAir. Associate members are Air Canada, Canadian Airlines International, and KLM Royal Dutch Airlines.

This brief is filed with the consent of the parties. The consent letters have been filed with the Clerk.

ATA's principal functions are to represent the interests of the commercial airline industry before Congress, state legislatures, and federal and state courts. ATA also works closely with the various federal agencies which regulate the airline industry, such as the Federal Aviation Administration and the Department of Transportation. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members.

ATA's members have a vital interest in the outcome of this case, which has far-reaching consequences to the airline industry. Almost all of ATA's passenger airline members have a frequent flyer award program similar to the award program offered by American Airlines. Indeed, this suit against American Airlines is only one of more than five such suits which have been brought against airlines in the Circuit Court of Cook County, Illinois, challenging changes in frequent flyer programs.

Each airline's frequent flyer program may differ in certain respects from the programs of other airlines, and changes in one airline's program may be made at different times, in a different manner, and for different reasons than changes in the programs of other airlines. ATA, in light of its experience and perspective, is particularly qualified to bring to the attention of the Court the industry-wide significance of frequent flyer programs, to explain the role these highly successful programs play in airline marketing, and to detail the manner in which these programs relate to "the dynamics of the air transportation industry," which this Court found significant in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2040 (1992).

The decision below—if allowed to stand—would preclude airlines from administering frequent flyer programs with the flexibility necessary in a competitive market with

the characteristics of the air transportation industry, in direct conflict with Congress' pre-emption of state laws "relating to rates, routes, or services." 49 U.S.C. App. § 1305(a)(1). Frequent flyer programs—progeny of Congress' decision to infuse free market competition into the United States airline industry—would be radically modified or terminated, to the detriment of the industry and the public. ATA and its members—as well as the passengers they serve—have a strong interest in avoiding any such result, and ensuring that courts correctly interpret and apply Section 1305(a)(1).

ATA and its members also have a strong interest in preserving the certainty and clarity of the regulatory regime under which air carriers operate. This Court in *Morales* contributed to that certainty and clarity by reading the pre-emption clause of Section 1305(a)(1) as written. The decision below threatens to unsettle that clarity, on which the airlines have relied.

STATEMENT OF THE CASE

The facts are set forth fully in petitioner's statement of the case, and ATA will not repeat them here. We note, however—and we file this brief to demonstrate—that the significance of this case extends far beyond the particular parties. Although the Illinois Supreme Court concluded that a "frequent flyer program is not an essential element to the operation of an airline," Pet. App. 6a, the fact is that all major domestic carriers have frequent flyer programs, and those programs are a significant part of the rate and service structure of today's air transport industry. Indeed, as explained below, they are a prime device for marketing the rates and services of one airline as against its competitors and constitute one of the most creative competitive innovations of the post-deregulation era.

The programs differ in various respects, and are constantly changing as particular airlines respond to a com-

petitive environment and seek to gain an advantage over their domestic and international rivals. As petitioner American Airlines did in this case, other carriers have modified the benefits and restrictions in their frequent flyer programs from time to time, to ensure continued viability of the programs consistent with the yield management approach that forms the core of effective competition in the modern air transport industry.

This case is of broad significance beyond the parties not only because of the importance and prevalence of frequent flyer programs, but also because it is a nationwide class action brought under state law to challenge the practices of an air carrier engaged in air transport services throughout the country. The effect of such a suit is tantamount to broad regulation of the relations between an airline and its customers under state law—precisely the result forbidden by the Airline Deregulation Act's express pre-emption of all state laws "relating to rates, routes, or services." 49 U.S.C. App. § 1305(a)(1). This case is of particular interest to ATA because the decision below—if allowed to stand—will interfere with competition among ATA members over frequent flyer programs, and deprive ATA members of the flexibility they need to administer yield management programs in a cost-effective manner. Both of these consequences will seriously inhibit the competitive market Congress sought to foster when it enacted the Airline Deregulation Act.

SUMMARY OF ARGUMENT

The express pre-emption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), is expansive in scope and unambiguous in meaning: "[N]o State * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services" of any interstate air carrier. Just two years ago in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992), this Court concluded that this provision should

be read as written, holding that state enforcement actions "having a connection with or reference to airline 'rates, routes, or services' are pre-empted." Respondents seek to enforce in state court an alleged right to certain airline services (air travel) at a particular rate (free, with frequent flyer credits). This attempt clearly relates to rates and services, and is accordingly pre-empted.

The conclusion of the majority below that frequent flyer programs are "peripheral to the operation of an airline" and "only tenuously connected to the airlines' rates, routes, and services" (Pet. App. 7a) is palpably untrue. Frequent flyer programs—one of the leading creative innovations of the deregulation era—are an integral part of the way airlines market their services. As might be expected given the important role such programs play, airlines compete intensely with each other over the terms of their frequent flyer programs, and the marketplace imposes serious restrictions on any airline's ability to alter frequent flyer benefits. In fact, the competitive marketplace has generally driven air carriers greatly to expand the benefits they offer frequent flyers.

Respondents' assertion that they have a right enforceable under state law to use their frequent flyer credits for any seat on any flight would—if upheld—directly affect rates and services by undermining the yield management process through which airlines achieve the most economically efficient mix of full fare, discount fare, and frequent flyer seats on any particular flight. This Court explained the importance of this process in *Morales*, noting that the economics of the air transport industry required restrictions on the availability of lower fare seats to increase the prospects of a profitable flight. *See* 112 S. Ct. at 2040. Frequent flyer seats are the lowest of the lower fare seats, and restrictions on their availability—evolving over time in response to changing competitive conditions—are critical to the manner in which air carriers set the rates for their services. State law actions that seek to

limit this flexibility are plainly related to the carriers' rates and services, and are therefore pre-empted.

The air transport industry plays a critical role in our Nation's economy, not only because of its own contribution but because of its ties to the aerospace manufacturing and tourism industries and its role in linking other segments of the domestic and international marketplace. The industry is currently facing an unprecedented economic crisis, having lost some $12.8 billion over the past four years. Opening the industry to massive new and unforeseen liabilities under state law through actions of the sort at issue here would be devastating not only to the air transport industry but to all the other segments of the economy inextricably linked to it. In expressly providing that all state laws relating to rates, routes, or services are pre-empted, Congress ensured that the industry would not be subjected to such liability. This Court confirmed that understanding in *Morales*, and should reaffirm it here.

ARGUMENT

I. THE AIRLINE DEREGULATION ACT PRE-EMPTS STATE REGULATION OF FREQUENT FLYER PROGRAMS

The Airline Deregulation Act contains an express pre-emption provision specifying that "no State * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of" any interstate air carrier. 49 U.S.C. App. § 1305(a)(1). In *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), this Court held that this provision means what it says, concluding that state enforcement actions "having a connection with or reference to airline 'rates, routes, or services' are pre-empted." *Id.* at 2037.

Here respondents' state court action seeks to enforce an alleged contractual right under Illinois common law to use frequent flyer credits in a particular manner for free

flights. The respondents claim an entitlement to a particular airline "service"—air transportation—at a particular "rate"—free with frequent flyer credits. Their suit plainly has "a connection with or reference to airline 'rates [and] services,' " and accordingly is pre-empted.

Under *Morales* and the Act, that is the end of the matter. There is no avoiding the pre-emptive effect of Section 1305(a)(1) by arguing—as the State attempted to do in *Morales*—that the state court action is not inconsistent with federal law. Such an approach would be pertinent if the issue presented concerned *conflict* pre-emption, *i.e.*, the displacement of state law because it conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). But that is not what is at issue here. This is a case of express pre-emption, and all that need be shown is that the state law has "a connection with or reference to" rates and services.

Certainly many if not most cases of express pre-emption involve situations in which state regulation conflicts with federal law, which presumably was the reason Congress enacted the express pre-emption provision in the first place. But it is not necessary to show such a conflict when the express pre-emption provision applies, and the absence of a conflict can hardly override the plain import of the statutory pre-emptive language enacted by Congress. As the *Morales* Court explained in rejecting the State's argument that its contemplated action was consistent with federal law, that issue "is beside the point. Nothing in the language of § 1305(a)(1) suggests that its 'relating to' pre-emption is limited to *inconsistent* state regulation." 112 S. Ct. at 2038 (emphasis in original).

This Court in *Morales* did note, in *dicta*, that " '[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 2040 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463

U.S. 85, 100 n.21 (1983) (bracketed language in original)). That possible limitation on the scope of Section 1305(a)(1) is plainly not applicable in this case, since respondents' action seeks to enforce alleged rights to particular services at particular rates. The connection to services and rates is direct, not tenuous and remote.

That point is confirmed by the following analysis of the role frequent flyer programs play in the air transport industry. It is important to note, however, that this analysis of the actual impact of the state regulation at issue is pertinent only in considering the possible remoteness limitation adverted to in *dicta* in *Morales*. The question is not whether state law is consistent with federal law, but rather whether the state regulation affects airline rates and services in so "tenuous, remote, or peripheral a manner" that the regulation cannot even be said to have "a connection with or reference to" the rates and services. *Morales*, 112 S. Ct. at 2037.

II. STATE REGULATION OF FREQUENT FLYER PROGRAMS RELATES TO AIRLINE RATES AND SERVICES

A. Airlines Market Their Services And Compete Through Frequent Flyer Programs

This Court in *Morales* explained that pre-emption under Section 1305(a)(1) applies to state laws which "have a significant impact upon the airlines' ability to market their product." 112 S. Ct. at 2040. The contrast with the analysis of the Illinois Supreme Court could not be clearer. That court declined to find pre-emption because a "frequent flyer program is not an essential element to the operation of an airline." Pet. App. 6a. This "essential element" test has no logical bearing on whether a state law "relat[es] to rates, routes, or services"—the statutory language. A ten percent discount offered by an airline for weekend travel may not be "essential" to the operation of the airline, but it is clear that a state law purporting to regulate such a discount program would

nonetheless be pre-empted as "relating" to the airline's rates and services.

In any event, the Illinois Supreme Court's view that frequent flyer programs are "peripheral to the operation of an airline" and "only tenuously connected to the airlines' rates, routes, and services" (Pet. App. 7a) is demonstrably false and not shared by the federal agency responsible for administering the Deregulation Act. The Department of Transportation has concluded:

> To be a successful competitor in today's airline industry, an air carrier must differentiate its service and develop incentives that reduce the need to rely on price competition. Frequent flyer programs are one of the most effective marketing practices yet devised for differentiating airline services and appealing directly to the traveler, who, in many instances, is different from the purchaser of the ticket. [Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices* (Feb. 1990), at 31.]

This conclusion—that "[f]requent flyer programs are one of the most effective marketing practices yet devised"—directly answers this Court's test in *Morales* that state laws are pre-empted if they "have a significant impact on the airlines' ability to market their product." 112 S. Ct. at 2040.

The Secretary's Task Force further explained that "[i]n interviews with airline executives, travel agents, and corporate travel managers, it has been acknowledged that frequent flyer membership has a powerful effect on air carrier selection." *Airline Marketing Practices, supra*, at 41. *See also* Ian Brown, The Loyal Family, *Airline Business: The Skies in 1994* 20, 21 (1994) ("Surveys have repeatedly shown that passengers take FFP [frequent flyer program] considerations into account when choosing flights and airlines"). Thus—although "essentiality" is plainly not the appropriate test—a frequent flyer program

may well be essential for many carriers to compete effectively in today's market for air travel consumers. *See id.* at 23 (managing director of Cathay Pacific quoted as saying "A mileage programme is essential if we are to have a competitive product").

In fact, airlines compete intensely over the terms of their respective frequent flyer programs. This competition dates from the first introduction of a frequent flyer program by American Airlines in May 1981. By July 1981, all of the other major domestic airlines had responded by offering competing programs of their own. This pattern was replicated internationally. European carriers generally did not offer free flights to frequent flyers until shortly after United States carriers gained access to London Heathrow slots in 1990. British Airways then promptly responded to this competition by offering a program with free flights, and other European carriers responded to the British Airways' initiative. *Id.* at 20.

Indeed, frequent flyer programs are such a major component of how airlines compete that there are even regularly published newsletters and journals such as *Business Flyer* and *Frequent* (now known as *Inside Flyer*) devoted to keeping consumers apprised of changes in frequent flyer programs and the comparative strengths and weaknesses of programs offered by different airlines. The monthly magazine *Frequent Flyer* also contains a regular department devoted to frequent flyer programs, and carries advertisements from airlines publicizing their programs. *See, e.g., Frequent Flyer* (June 1994), at 21, 64.

Recent articles in *Frequent* include "The Battle for California" (June 1990, p. 9), detailing the competing bonus mile programs offered by American, Delta, United, and USAir to attract customers on the Los Angeles—San Francisco route; "Air Wars 2 (Battle Review)" (March 1990, p. 3), describing one airline's offer of double or triple miles usable for a more extended period of time than allowed under competitors' programs; and "Continued Evolution of Elite Level Programs" (Jan. 1990, p. 2), noting that "elite level programs became a battleground" and that new programs by certain airlines "will force others * * * to go back and review their benefit program."

Regular features in the magazine include "Partners," listing which airlines have linked with others in frequent flyer programs, and "Bonus Bulletin," listing special promotions offered by the airlines to their frequent flyers for limited times. The magazine even conducts an annual awards program, bestowing "Freddies" in categories for best customer service, best overall award, best overall promotion, best affinity credit card, best program newsletter, best elite level program, and best frequent flyer program. *See Frequent* (Jan. 1990, at 1, 20). *Frequent* also publishes the *Official Frequent Flyer Guidebook*, with comprehensive information about the competing programs.

Significantly, among the issues discussed in *Frequent*—by both reporters and readers writing letters to the editor—are limits imposed by the airlines on redemption of frequent flyer miles. Letters tout one program's mileage awards "free of capacity control for 'Gold' members with no extra mileage" (April 1990, p. 2); an article on capacity controls reviews different programs and advises frequent flyers that "[i]f you continue to have problems with your award destination, consider flying another airline * * *. Remember, you do have choices" (March 1990, pp. 1, 20).

This intense competition has resulted in an overall expansion of benefits under frequent flyer programs, with airlines extending originally limited periods for the redemption of awards; offering enhanced opportunities to earn mileage credits through hotel, auto rental, telephone, and general credit card purchases; and broadening not only opportunities to earn miles but also redemption possibilities through affiliation with other, especially international, air carriers. The Department of Transportation recog-

nized this in 1992, when it rejected a petition seeking a rulemaking addressed to frequent flyer programs. As the Department noted, "[s]ince the programs began, each carrier has greatly expanded the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive." Pet. App. 99a.

The airlines thus face significant competitive pressures in the marketplace which restrict their ability to modify frequent flyer programs. Carriers recognize that excessive restrictions will be noted by their most frequent flyers, may well be widely publicized, and could result in loss of customer loyalty to rival airlines.

The foregoing makes clear that the terms of an airline's frequent flyer program are an integral part of that airline's "rates" and "services". State court actions seeking to regulate airline practices with respect to frequent flyer programs therefore plainly "relat[e] to rates, routes, or services" and are pre-empted by the plain language of Section 1305(a)(1). As Congress intended, the competitive market established by the Deregulation Act—not the States—regulates this aspect of airline rates and services.

It is also clear that state regulation is inconsistent with the purposes of the Deregulation Act, because the state action directly implicates competition among the airlines and the pro-competitive policies of the Act. A state effort to raise or lower airline rates would indisputably be barred by the express pre-emption clause, and would hinder competition among various carriers on the basis of fares. But airlines compete just as vigorously through their frequent flyer programs, and any state effort to regulate those programs similarly hinders competition. Indeed, competition through frequent flyer programs may often be more effective for airlines, because it entails less risk than an across-the-board reduction in fares and carries with it the added advantage of rewarding and solidifying customer loyalty.

B. The Airlines' Yield Management System For Setting Rates Under Deregulation Requires Flexibility In Frequent Flyer Programs

Respondents' state law claims have another effect on airline rates and services, quite apart from affecting competition over frequent flyer programs themselves. In fact, the attempted state regulation in this case goes to the core of how the airlines compete in the deregulated marketplace established by the Act.

To appreciate fully the impact the decision below will have on airline rates and services, it is necessary to understand "the dynamics of the air transportation industry." *Morales*, 112 S. Ct. at 2040. As this Court explained:

> The expenses involved in operating an airline flight are almost entirely fixed costs; they increase very little with each additional passenger. The market for these flights is divided between consumers whose volume of purchases is relatively insensitive to price (primarily business travelers) and consumers whose demand is very price sensitive indeed (primarily pleasure travelers). Accordingly, airlines try to sell as many seats per flight as possible at higher prices to the first group, and then to fill up the flight by selling seats at much lower prices to the second group (since almost all the costs are fixed, even a passenger paying far below average cost is preferable to an empty seat). [*Id.*]

The Court went on to recognize that "substantial restrictions on the availability of the lower priced seats (so as to sell as many seats as possible at the higher rate)" were necessary in order for this pricing system to function. *Id.*

Frequent flyer tickets are, of course, the lowest of the lower priced seats. Without the ability to impose restrictions on the availability of seats for frequent flyers, the complex and sophisticated revenue management systems employed by every air carrier—systems the Department of Transportation has recognized as "pro-competitive," *see*

Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Pricing* 188-189 (Feb. 1990) —could not function.

This requisite flexibility is completely incompatible with the regulatory regime respondents seek to impose under Illinois common law. American Airlines' frequent flyer brochure expressly stated that "program rules, regulations, travel awards and special offers are subject to change without notice." *See* Pet. Br. 8 & n.13. Respondents nevertheless insist on more detailed disclosure—precisely the sort of disclosure that cannot be made because of the fluidity of the yield management process in today's competitive environment. An air carrier simply cannot know in advance how developing competition will change the mix of full fare, discount fare, and frequent flyer seats that will maximize revenue on a particular flight; how long seats should be set aside for business travelers on a particular route before being opened up for additional frequent flyer travelers; or what the availability of frequent flyer seats will be on new routes it may offer in the future. As the Federal Circuit recently explained:

> [T]o respond to a changing market the airlines may limit the number of tickets available at a particular applicable fare. The airline designates a number of "available seats" to be sold at each applicable fare for a given service and this number fluctuates on an hour-by-hour, or sometimes a minute-by-minute, basis. [*Alaska Airlines, Inc.* v. *Johnson*, 8 F.3d 791, 793 (Fed. Cir. 1993).]

In addition, if Illinois may regulate rates and services through common law actions of the sort at issue here, then so may any and every other State. Airlines would face a chaotic patchwork of different and even conflicting regulation. Requiring compliance with 50 different common law advance disclosure rules, which themselves evolve over time, would seriously distort the yield management process and directly inhibit the ability of air carriers to compete in a cost-effective manner.

Respondents' assertion that they have a legally enforceable "right" to use frequent flyer credits to purchase "any seat" on "any flight" would confer a special status on frequent flyer fares not accorded any other fare. Thus, an airline may advertise a discount fare for a particular flight, but that does not confer a "right" on any consumer to "any seat" on that flight at that price. Rather, as shown, the extent of the availability of the discount fare seats depends upon the yield management process for that flight. This Court has already held in *Morales* that state efforts to regulate the disclosure of limitations required in connection with the marketing of such discount fares are pre-empted by Section 1305(a)(1); a different result should not obtain with respect to the marketing of a specific type of fare—a frequent flyer fare—through the promotional materials of the frequent flyer program.

III. THE DECISION BELOW, IF ALLOWED TO STAND, WOULD HAVE A DRAMATIC ADVERSE FINANCIAL IMPACT ON THE AIR TRANSPORT INDUSTRY

In its Report to the President and Congress ("Report") issued in August 1993, the National Commission to Ensure a Strong Competitive Airline Industry concluded:

> This nation's civil aviation system is a vital national resource. * * * The air transportation system has become essential to economic progress for the citizens and businesses of this nation. Without it, our country will be hamstrung in its ability to participate in an increasingly global community and marketplace. [Report, *Change, Challenge, and Competition: A Report to the President and Congress*, at 1.]

In establishing the Commission, Congress itself found that "[t]he Nation's airlines provide our connections with the global economy. A strong airline industry is essential to our Nation's ability to compete in the international

marketplace." Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, Pub. L. No. 102-581, § 204(a)(2), 49 U.S.C. App. § 1371 note. The importance of the air transport industry derives not only from the 550,000 people it employs directly, but also from its critical ties to the aerospace manufacturing and tourism industries, and its role linking other sectors of the economy, both domestically and internationally. *See* Report, at 5 ("The Economic Impact of Aviation").

Congress in establishing the Commission, and the Commission in its Report, recognized that the airline industry is currently confronting a serious economic crisis, one with profound implications for the Nation's economy as a whole. In the past four years, the industry has lost some $12.8 billion—more than twice what it earned since the beginning of scheduled airline service in 1925. As Congress found, "[t]he Nation's airlines are in a state of financial distress," endangering their ability "to accommodate the growing aviation traffic demands of the 1990's which threaten to undermine our Nation's ability to compete in the global economy." Pub. L. No. 102-581, *supra*, § 204(a)(3). *See* Report, at 12.

Against this background, the decision below threatens to saddle the industry with enormous new unforeseen liabilities. In addition, if the airlines are forced to abandon yield management restrictions for frequent flyer seats, or lose the flexibility to revise frequent flyer benefits in response to competitive pressures, the ability to earn an adequate return on flights may well be lost.

Our point is not, of course, that the airlines should be free from this liability simply because it would be costly for them and in turn for the economy as a whole. It is instead that Congress—sensitive to the vital role a healthy airline industry plays in our economy—has already expressly provided that the airlines not be subject to the prospect of this sort of liability when it passed Section

1305(a)(1). By pre-empting *any* state law "relating to rates, routes, or services," Congress ensured that an air carrier's liability for these aspects of its business would be set by the competitive marketplace—which makes the carrier pay through business and revenue lost to its rivals —or by the Federal Government—which can appropriately weigh the vital role of the industry and its economic health in proceeding with any appropriate remedial action.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment below should be reversed.

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No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the pre-emption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, pre-empts all state laws having a reference to or connection with airline rates, routes, or services?

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") respectfully submits this brief *amicus curiae* in support of petitioner, American Airlines.[1] The Chamber is the largest federation of businesses, trade and professional associations and state and local chambers of commerce in the world. The Chamber represents over 220,000 businesses and organizations, with substantial membership in each of the 50 states. A significant function of the Chamber is to represent the interests of its

[1] Both petitioner and respondents have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

members in important matters before this Court, the lower courts, the Congress, Executive Branch, and independent regulatory agencies of the federal government. Consequently, the Chamber has sought to advance those interests by filing briefs in this Court in cases of importance to the business community. *E.g., Livadas v. Aubry*, No. 92-1920; *Honda Motor Co. v. Oberg*, No. 93-644.

The Chamber's members have long supported federal pre-emption in a variety of subject matters in which conflicting state laws make operating interstate businesses a difficult and burdensome task. *E.g., Lingle v. Magic Chef*, 486 U.S. 399 (1988) (NLRA pre-emption); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (ERISA pre-emption); *Gade v. National Solid Wastes Management Assoc.*, —— U.S. ——, 112 S. Ct. 2374 (1992) (OSHA pre-emption). Congress clearly intended for the uniform and exclusive federal regulation of the nation's airlines when it passed the Airline Deregulation Act of 1978, 49 U.S.C. App. §§ 1301 *et seq.* (the "Deregulation Act"). The question presented in this case—whether the Airline Deregulation Act pre-empts the application of state common law and statutory consumer fraud damages actions—is of great concern to the Chamber's members because it would signal a return to the conflicting state regulations that business has traditionally opposed.

The Illinois Supreme Court's narrow interpretation of the Deregulation Act's pre-emption statute represents a dangerous departure from the Act. Like ERISA's pre-emption statute, to which it is closely analogous, the Deregulation Act's pre-emption statute requires a broad and expansive reading. To do otherwise threatens the settled body of pre-emption law, and places airline companies at a renewed risk of re-regulation and conflicting state laws.

STATEMENT OF THE CASE

The Chamber incorporates by reference the summary contained in Petitioner's brief.

SUMMARY OF ARGUMENT

The Airline Deregulation Act of 1978, 49 U.S.C. App. §§ 1301 *et seq.*, a landmark piece of legislation, deregulated an industry that since its inception had been heavily regulated by the federal government and the states. In order to achieve its goal, Congress included in the Deregulation Act a broad pre-emption statute, designed to insure that the states would not undo federal deregulation with regulation of their own. Thus, Congress appropriately chose to pre-empt all state laws "relating to" airline rates, routes, or services. In doing so, Congress mirrored the "relate to" language from the Employee Retirement Income Security Act.[2]

Two terms ago this Court decided on the breadth of the pre-emption statute, and gave it a broad interpretation. *Morales v. Trans World Airlines, Inc.*, —— U.S. ——, 119 L.Ed.2d 157 (1992). The Court noted its similarly to ERISA's pre-emption statute, and consequently drew upon many decided ERISA cases for guidance in interpreting the phrase. The Court concluded the phrase "relate to" has a broad meaning, consistent with the decided ERISA cases.

Notwithstanding the decision in *Morales*, the Illinois Supreme Court has stubbornly refused to find that state actions seeking damages for "retroactive" modifications to an airline's frequent flyer program are pre-empted. In the court's view, actions seeking statutory or contract damages have only a "slight connection" with rates, routes, or services, and in any event frequent flyer programs are not "essential elements" of airlines. Nowhere in the *Morales* decision, or any of the previously decided

[2] 29 U.S.C. § 1144(a).

ERISA cases interpreting the very same language, is there such a test. The Chamber urges this Court to recognize that the Illinois Supreme Court's decision is inconsistent with decided case law and must be reversed.

ARGUMENT

THE ILLINOIS SUPREME COURT'S DECISION IS AN UNWARRANTED AND UNNECESSARY DEPARTURE FROM SETTLED AIRLINE DEREGULATION ACT AND ERISA PRE-EMPTION LAW.

The question in this case is whether Illinois' consumer fraud act and common law breach of contract actions directed at the rates and services offered through American Airline's frequent flyer program are pre-empted by the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1).[3] The respondents seek to have the Court hold that causes of action seeking monetary damages for modifications to an airline's frequent flyer program do not "relate to" an airline's rates, routes, or services. As a practical matter, the respondents are asking the Court to turn its back on a well-settled body of law and re-examine a pre-emption statute whose meaning is clear. The Chamber believes the facts of this case do not warrant such a re-examination.

Congress recognized in enacting the Deregulation Act that pre-empting state laws was necessary to insure "the States would not undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, —— U.S. ——, 119 L.Ed.2d 157, 164 (1992). Congress' goal of airline deregulation would obviously have

[3] "Except as provided in paragraph (2) of this subsection, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.", 49 U.S.C. App. § 1305(a)(1).

been frustrated if conflicting state laws were not pre-empted by the Deregulation Act, but the vast body of existing federal regulation was eliminated.[4] Accordingly, the Deregulation Act includes a pre-emption statute whose language is broad and encompasses all state laws "having a connection with or reference to airline rates, routes, or services. . . ." *Morales*, 119 L.Ed.2d at 167-68.

Irrespective of the plain meaning of the Deregulation Act's pre-emption clause, the Illinois Supreme Court has completely misconstrued Congress' intent. The court has seized upon a narrow exception in *Morales*—that some state actions may affect airline rates, routes, or services in too tenuous a manner to have pre-emptive effect—that now threatens to swallow the rule. The Chamber urges this Court to recognize that if the Illinois decision is upheld, other states will be encouraged to re-regulate in a field Congress has clearly designated as appropriately federal subject matter. This, in turn, may result in a narrower reading of other statutes containing broad pre-emption language.

The Chamber also urges reversal of the Illinois decision because the pre-emption statute employs the very same operative language as the Employee Retirement Income Security Act's (ERISA) pre-emption clause.[5] This Court has made it amply clear that the phrase "relate to" has a settled meaning in ERISA pre-emption cases; for consistency in statutory interpretation and predictability it should not have one meaning in ERISA cases and a different meaning in airline deregulation cases.

[4] The overall breadth of the Deregulation Act is one indicator of the requirement for a comprehensive pre-emption statute. For example, the Deregulation Act did away with the Civil Aeronautics Board. 49 U.S.C. App. § 1551.

[5] 29 U.S.C. § 1144(a).

A. The Deregulation Act Pre-emption Statute Is Deliberately Expansive and Commands a Broad Interpretation.

The Airline Deregulation Act was passed in the belief that "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality . . . of air transportation services." *Morales*, 119 L.Ed.2d at 164. Congress could not have accomplished its goal of eliminating the threat of conflicting and inconsistent state regulation without exempting all state laws relating to rates, routes, and services from state regulation. As the Fifth Circuit noted in a related case to *Morales*, "Congress preempted this area to maintain uniformity and to avoid the confusion and burdens that would result if interstate and international airlines were required to respond to standards of individual states." *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir. 1990). Thus, Congress included in the Deregulation Act a pre-emption clause whose "ordinary meaning . . . is a broad one." *Morales*, 119 L.Ed.2d at 167.

The issue in *Morales* was whether guidelines developed by the National Association of Attorneys General (NAAG) and adopted by seven states, which prohibited allegedly deceptive airline fare advertisements, were pre-empted by the Deregulation Act. The majority had no trouble in making such a finding. In doing so, *Morales* noted the similarities in language between the Deregulation Act's pre-emption statute and ERISA's pre-emption statute. In both statutes the key operative phrase is "relate to." Exactly because the statutes are so similar, Justice Scalia recognized the need for consistent interpretation in *Morales*:

> "Since the relevant language of the ADA [Airline Deregulation Act] is identical [to ERISA's pre-emption language], we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline rates, routes, or services are pre-empted under 49 U.S.C. § 1305(a)(1)." 119 L.Ed.2d at 167-68.

The "connection with or reference to" language in *Morales* is not unique to *Morales*; instead, the Court drew upon many earlier ERISA pre-emption cases. *E.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

As in ERISA pre-emption cases, "pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Morales*, 119 L.Ed.2d at 167. When Congress' command is explicit, as in this case, the court's task is made that much simpler. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97. Despite respondents' arguments, there is no good reason for believing Congress intended a narrow pre-emption clause in this area.

The *Morales* Court defined the phrase "relate to" by reference to decided ERISA cases. The "breadth of [the Act's] pre-emptive reach is apparent from its language." *Morales*, 119 L.Ed.2d at 167, *quoting Shaw, supra*, 463 U.S. at 96. It should be accorded an "expansive sweep." *Id., quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987). It has a "broad scope," *Id., quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). It is "broadly worded," *Id., quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990), and "conspicuous for its breadth," *quoting FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).[6]

It is thus clear the pre-emption statute must be accorded an expansive interpretation. No other interpreta-

[6] In a recent ERISA pre-emption case decided after *Morales*, the Court held a broad interpretation "is true to the ordinary meaning of relate to, see Black's Law Dictionary 1288 (6th ed. 1990) and thus gives effect to the deliberately expansive language chosen by Congress." *Dist. of Columbia v. Greater Washington Bd. of Trade*, 121 L.Ed.2d 513, 520 (1992), *quoting Pilot Life, supra*, at 46. That is the only reading that the pre-emption clause supports.

tion is consistent with Congress' intent or the body of decided ERISA cases interpreting the very same language. In this case, however, the Illinois Supreme Court has simply chosen to re-affirm its pre-*Morales* decision. This does great harm to the integrity of *Morales* and the many cited ERISA cases, and must not be countenanced.

B. Reaffirming the *Morales* Test for Pre-emption Is Necessary to Preserve the Settled Body of ERISA Pre-emption Decisions.

Despite the statute's clear meaning, the Illinois Supreme Court has severely restricted *Morales*, and thus harmed the well-settled body of decided ERISA cases. In its opinion, state "laws that had only a slight connection to an airlines' rates, routes, or services, would not be preempted by section 1305(a)(1)." App. at 5a.[7] That is, if the airline program is not an "essential element to the operation of an airline," it is not to be pre-empted. App. at 6a. Nowhere in *Morales*, or the closely analogous ERISA pre-emption cases, is there the notion that state actions with a "slight connection" to "non-essential elements" are not pre-empted. The only exception to the broad pre-emption rule are actions that are too tenuous, remote or peripheral. *Morales*, 119 L.Ed.2d at 172, *quoting Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100, n.21. The Illinois court is simply wrong in arguing that the exception applies in this case.[8] Further, the very limited exception stated in *Morales* is not a basis upon which the "essential elements" test can rest. In light of the vast body of precedent interpreting the phrase "relating to,"

[7] References cited as "App. at ——" are references to Petitioner's Petition for a Writ of Certiorari.

[8] In *Morales*, the Court used as examples of state laws that are too tenuous laws prohibiting gambling and prostitution as applied to airlines. *Morales*, 119 L.Ed.2d at 171-72. There is a quantum difference in relatedness between laws that prohibit the acts mentioned above, and contract or tort actions awarding damages for modification of a frequent flyer program.

there is no justification for now departing from the *Morales* decision and the ERISA cases it relied on.

The *Morales* decision also makes it abundantly clear that § 1305(a)(1) does more than simply pre-empt "the States from actually prescribing rates, routes, or services." That argument, the Court said, "simply reads the words "relating to" out of the statute." *Morales*, 119 L.Ed.2d at 168, *citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). The problem with the "essential element" requirement proffered by the Illinois court is that it commits exactly that offense. In *Morales*, the NAAG guidelines taken together would have "establish[ed] binding requirements as to how tickets may be marketed if they are to be sold at given prices." *Morales*, 119 L.Ed.2d at 170. In the case at bar, awarding damages for an airline's modification of its frequent flyer program "effectively creat[es] an enforceable right to [a] fare. . . ."[9] *Morales*, 119 L.Ed.2d at 170. There was simply no discussion of "essential elements" in *Morales*, and there should be none.

The *Morales* decision also addressed the "utterly irrational" notion that only state laws specifically addressed to the airline industry are pre-empted. Drawing specific reference to ERISA cases, the Court stated "A state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Morales*, 119 L.Ed.2d at 169, *quoting Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990). Nonetheless, the Illinois court reasoned that "[a] frequent flyer program is not

[9] The Ninth Circuit has also run afoul of this problem. In *West v. Northwest Airlines, Inc.*, 995 F.2d 148 (9th Cir. 1993) (US app pndg) the court held that West's state contract and tort law actions against Northwest for overbooking a flight were not pre-empted by the Deregulation Act. Despite a vigorous dissent, the court held that the actions were too tenuously related to rates, routes, or services. This decision, like the case at bar, is wrong and threatens to undo Congress' deregulation goals.

an essential element to the operation of an airline. Indeed, the airline industry functioned successfully for decades prior to providing incentives to its travelers in the form of frequent flyer programs." App. at 6a. By the court's reasoning, any technological or marketing development in the airline industry may be excepted from the pre-emption statute either because it is non-essential or because it came about after the Deregulation Act was passed. This view of the pre-emption clause is "utterly irrational."

A similar argument was rejected in the ERISA pre-emption case, *FMC Corp. v. Holliday*, 498 U.S. 52, 58-59 (1990). Here the Court held that "to interpret the [ERISA] pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA. . . would be incompatible with the provision's legislative history. . . . These were rejected in favor of the present language in the Act, indicating that the section's pre-emptive scope was as broad as its language." Thus, whether or not airline frequent flyer programs are "essential" or are specifically dealt with in state law is simply irrelevant to a proper pre-emption analysis. It does not seem logical that, applying the very same language and reasoning, there can be different results in this case than *FMC Corp.*

As the Court stated in another ERISA pre-emption case, *Metropolitan Life*, the Illinois causes of action "bear[] indirectly but substantially" on airlines, for if the decision is upheld, airlines will have to tailor their frequent flyer programs to the laws of the 50 states or risk being subject to actions like this one.[10] *Metropolitan Life*,

[10] The following description of the dangers of conflicting state laws, as Justice Blackmun noted in the ERISA case *Shaw v. Delta Air Lines, Inc.*, is equally on point here:

> "An employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan. Obligating the employer to satisfy the varied and perhaps conflicting requirements of particular state fair employment laws, as well as the requirements of Title VII, would make administration of a uniform nationwide plan more difficult. . . . ERISA's comprehensive pre-emption of state law was meant to minimize [] interference with the administration of employee benefit plans."

Shaw, 463 U.S. at 105, n.25.

Justice Blackmun's reasoning applies just as strongly in this case. There is no doubt that both consumers and airlines benefit as a result of frequent flyer programs. If the Illinois court's decision is upheld, and differing or conflicting state laws are not pre-empted, the important goals of furthering efficiency, innovation, low prices, variety and quality of air transportation services, will be at risk.

471 U.S. 724, 739. Indeed, as petitioners explain, Illinois has already become the forum of choice for plaintiffs' frequent flyer suits against the airlines. App. at 11.

It is precisely because this Court has equated the Deregulation Act's pre-emption statute with ERISA's, that any departure from the *Morales* decision is also a departure from the well-settled body of ERISA pre-emption cases. The respondents would not dare to suggest that ERISA's pre-emption statute does not pre-empt state laws with only a "slight connection" or that are "non-essential" to employee benefit plans. Nonetheless, the Court must be wary of upholding the Illinois court's decision, using as a basis the very same language in the Deregulation Act as is found in ERISA.

Because the decision of the Illinois Supreme Court threatens the well-settled body of ERISA decisions this Court has created, and because the *Morales* decision is consistent with those cases, the Chamber respectfully urges the Court to reverse the decision.

CONCLUSION

The decision of the Illinois Supreme Court should be reversed.

Respectfully submitted,

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